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84-1989

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

ELMER SHORTER, as personal representative of the Estate of DOREEN V. SHORTER, deceased,

Petitioner,

vs.

ROBERT E. DRURY, M.D., et ux.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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June 21, 1985

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Free Exercise Clause of the First Amendment is violated by the defense of assumption of the risk when applied to a Jehovah's Witness who, on religious grounds, has refused to consent before surgery to permit a blood transfusion if one is needed, and continues to refuse to permit a blood transfusion after bleeding becomes apparent, when the necessity for such a transfusion is due solely to the negligence of the doctor?

2. Whether the record contains sufficient evidence to conclude that Doreen Shorter understood and expressly assumed the risk of bleeding to death as a result of the negligence of the attending physician?

3. Whether the Washington Supreme Court erred in failing to consider evidence directly bearing on the issue of assumption of risk, discovered subsequent to its decision as a result of media publication of that decision?

4. Whether a non-patient spouse/relative may impact a medical liability release form signed by a competent adult patient?

5. Whether the trial Court erred in permitting the jury to consider whether petitioner knowingly and voluntarily assumed the risk of death to his wife, Doreen Shorter, when awarding damages to the Estate of Doreen Shorter?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

The petitioner, ELMER SHORTER, as personal representative of the Estate of Doreen V. Shorter, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Washington entered in this proceeding on January 11, 1985.

OPINIONS BELOW

On January 25, 1983, the Superior Court of the State of Washington, for Snohomish County, entered a judgment on a verdict in favor of petitioner which reduced petitioner's damages by 75 percent, which is attached hereto at page 1a of the Appendix. Petitioner appealed and respondents cross-appealed, and on May 24, 1984, Division I of the Court of Appeals for the State of Washington certified the case to the Supreme Court of the State of Washington (App. 4a), which accepted review and affirmed the decision of the trial Court in an opinion entered January 11, 1985, reported at 103 Wn.2d 645,____ P.2d____(1985), and is attached hereto at page 6a of the Appendix. Petitioner's motion for reconsideration and to take additional evidence was subsequently denied in an unpublished order dated March 25, 1985, a copy of which is attached hereto at page 24a of the Appendix.

JURISDICTION

The judgment to be reviewed is the January 11, 1985, opinion and order of the Supreme Court of the State of Washington, which affirmed the judgment of the Superior Court of the State of Washington, for Snohomish County.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(3).

CONSTITUTIONAL AMENDMENTS

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, §1.

STATEMENT OF THE CASE

The petitioner, Elmer Shorter, brought this medical malpractice and wrongful death action on behalf of his deceased wife, Doreen V. Shorter.

Doreen Shorter became pregnant in the summer of 1979, and on October 4, 1979, she consulted the respondent, Robert E. Drury, M.D., regarding her pregnancy. Upon her first visit to Dr. Drury, Doreen Shorter informed him that she was a Jehovah's Witness, and was proscribed by her religious convictions from accepting a transfusion of blood or blood products.

Despite the fact that Doreen Shorter informed him at that time that her last menstrual period was May 31, 1979 (RP 68:11-18), Dr. Drury conducted a pelvic examination and concluded that she was 8 to 10 weeks pregnant. (RP 69:24-70:14). Dr. Drury recognized his conclusion presented an understatement in the gestational stage of her pregnancy of approximately ten weeks in light of her last reported period, but that fact did not raise any questions in his mind at that point. (RP 70:15-71:3). However, medical testimony revealed that this discrepancy could not be explained on the basis of an irregular menstrual cycle. (RP 204:21-205:6). Dr. Drury again examined Doreen Shorter on October 22, 1979, and, like his prior examination, did not detect any fetal heart tone. (RP 74:18-75:25).

On November 7, 1979, Doreen Shorter was examined by Dr. Drury's more experienced partner, who conducted a pelvic examination and concluded by Doreen Shorter's uterine size that she was three and one-half months pregnant and was clearly in her second trimester. (RP 91:1-9; 380:22-24).

Two days later, on November 9, 1979, Dr. Drury again examined Doreen Shorter and, when considering the results of his partner's examination recorded in the file, for the first time formed the impression that she experienced a "missed abortion." That is, her fetus died and her uterus had failed to naturally discharge the products of conception.

On November 23, 1979, Doreen Shorter again visited Dr. Drury's office. She underwent a routine pregnancy test administered by Dr. Drury's staff, and did not actually see Dr. Drury. In reviewing the results, Dr. Drury concluded that Doreen Shorter was not actively pregnant and that she had definitely experienced a missed abortion.

There are three general courses of action which may be taken in cases of missed abortion to evacuate the uterus: (1) Do nothing, and see if the body will naturally remedy the situation; (2) induce artificial labor by use of vaginal chemical suppositories; or (3) surgically remove the fetus by a dilation and curettage (D and C). If a D and C is chosen, there are then two alternate methods of performing that operation: (a) The curette method, where sharp surgical instruments are used; or (b) the suction method.

The evidence at trial showed that Doreen Shorter was in the second trimester of gestational development. (RP 211:1-6; 212:1-13; 288:24-290:9; 382:18-383a:4; 475:20-476:9). As the gestated uterus develops, the uterine walls become softer, thinner, and full of blood. The uterus becomes more vascular and an increased amount of blood supply goes to the uterus which then, in turn, goes to the placenta so that the uterus becomes extremely soft and very vulnerable to risk of injury from instrumentation. (RP 233:8-20). Surgical evacuation of the uterus is therefore much riskier in the second trimester

than in the first. (RP 88:15-23; 362:19). Because of the increased surgical difficulty of performing a second-trimester D and C, Dr. Drury felt competent to perform a D and C only if the patient was in her first trimester, and would refer any patient in her second trimester to a more competent physician. (RP 88:24-89:11). However, he did not diagnose Doreen Shorter to be in her second trimester, despite the evidence to the contrary. As a result, Dr. Drury scheduled Doreen Shorter to undergo a D and C by him on November 30, 1979, for surgical evacuation of her uterus.

Dr. Drury scheduled to perform his D and C using the curette method, even though that method of uterine evacuation posed the highest degree of bleeding risk from uterine perforation, and even though he knew the procedure itself was made riskier due to the fact that Doreen Shorter could not accept blood. (RP 251:15-252:11; 110:13-111:4). He did not apprise the Shorters of these facts, nor did he apprise the Shorters of any of the alternate methods for uterine evacuation, all of which presented less bleeding risk. He was not aware of these alternate methods or was otherwise not familiar with them, although they were not new to the medical community. Dr. Drury told the Shorters that the scheduled D and C was a routine medical procedure and that he had performed this procedure numerous times in the past with good results. (RP 162:21-163:4; 414:11-415:7). In actuality, however, he had previously performed only one or two D and C procedures for missed abortion, and both were performed during his residency training under the supervision of an experienced doctor, and both were performed during the first trimester, a surgically safer time to operate. (RP 24:7-25).

On November 29, 1979, the day before Doreen Shorter's scheduled D and C, she consulted a Dr. Alan E. Ott to make certain her baby was indeed dead and to ascertain whether Dr. Drury's proposed treatment was a proper means of treatment. (RP 188-4:10-22). Doreen Shorter informed Dr. Ott that she was a Jehovah's Witness and that she was prohibited

by her religious beliefs from accepting a blood transfusion. Dr. Ott simply advised her that *a* D and C would be proper, and he, likewise, did not discuss any other means of uterine evacuation available to her; nor did he mention that there were the two alternate methods for performing the D and C, and which of these two methods would be most appropriate in this case from the standpoint of blood-loss risk. (RP 188-5:13 to 188-6:7.)

Believing the scheduled D and C to be a routine procedure (RP 414:3-21), Doreen Shorter was admitted to the hospital to undergo the operation. There Doreen Shorter was presented, for the first time, a document purporting to "release the . . . attending physician from any responsibility whatever for unfavorable reactions or any untoward results due to [her] refusal to permit the use of blood or its derivatives." (App. 25a). Although Dr. Drury had never before mentioned this document, the Shorters both signed it under the belief that it was to safeguard against their possible assertion, should a blood transfusion become necessary but was not administered, that Dr. Drury would be guilty of abandonment for failing to administer the transfusion. (RP 617:17-619:9).

During the operation, Dr. Drury severely lacerated Doreen Shorter's uterus, bladder, and mesentery membrane (RP 149:20-23; 228:14-232:8). Medical experts at trial testified it was the worst damage from a D and C that they had ever seen. (RP 188-17:3-6; 232:1-8; 370:4-7; 573:6-10). "[T]here was a fair amount of blood loss at the time of the procedure" (RP 188-12:17-19), and Doreen Shorter suffered further uncontrolled bleeding for approximately two and one-half hours before remedial surgery was undertaken. (RP 141:14-15; 188-15:9-12). Dr. Drury did not know he had injured Doreen Shorter and instead reported her to be in satisfactory condition upon completion of his operation, even though she was experiencing extreme abdominal pain. (RP 61:21-25; 148:1-7). However, it was established at trial that he should have immediately known of the damage and immediately

taken corrective measures to stop the bleeding. (RP 222:9-224:12; 369:23-371:15). Dr. Drury himself testified that time is of the essence if the patient is bleeding internally, and a great amount of blood loss can be prevented by taking immediate action (RP 153:10-155:19). He further testified that if he had not inflicted the damage, or if he had been aware of the damage when it occurred, Doreen Shorter would have been saved and would be alive today. (RP 681:17-682:1; 183:9-18). Expert medical testimony affirmed Dr. Drury's assessment, stating that Doreen Shorter would have survived the operation in perfect condition if respondent had not inflicted the damage to her (RP 251:1-8), and would have survived despite Dr. Drury's negligence if only the damage had been promptly recognized and corrective measures taken at that time. (RP 474:11-22). Further medical testimony indicated that where bleeding occurs and blood replacement cannot be accepted, the *only* opportunity to save the patient is immediate remedial action to stop the bleeding. (RP 368:15-24; 372:2-373:5). There was also medical opinion that she would have survived if she had been transfused.

After the D and C, Doreen Shorter experienced extreme abdominal pain and, approximately forty-five minutes later, the insertion of a catheter confirmed internal bleeding. "It was also obvious from lab take and blood pressure she had lost a lot of blood . . . ." (RP 727:9-12). Dr. Drury was apprised of the situation and he contacted Dr. Alan E. Ott for assistance (coincidentally, the same Dr. Ott who had examined Doreen Shorter the previous day). The doctors told Doreen Shorter that there was probably a perforation of the uterus and that she desperately required a massive blood transfusion to save her life. Doreen Shorter refused transfusion because of her religious convictions. The doctors also told Doreen Shorter's husband, the petitioner, that a blood transfusion was needed to prevent death. Petitioner replied that the decision to permit a blood transfusion was the decision of Doreen Shorter alone, and petitioner refused to assent to forcibly transfusing her in spite of her religious

convictions. Petitioner instructed the doctors to do everything they could, but to not use blood. Legal counsel for the hospital was contacted and paperwork was prepared to obtain a court order compelling the transfusion of Doreen Shorter. Before such an order could be obtained by the hospital, Dr. Ott, assisted by Dr. Drury and another doctor, performed remedial surgery, but Doreen Shorter subsequently died from loss of blood.

Petitioner thereafter brought this suit for medical malpractice, as personal representative of the Estate of Doreen Shorter. The case was submitted to a jury on the basis that "Mr. and/or Mrs. Shorter knowingly and voluntarily assum[ed] the risk of death to Mrs. Shorter from bleeding under the facts of this case." (App. 2a). Petitioner argued that infusion of assumption of risk theory violated Doreen Shorter's First Amendment right to the free exercise of her religion.

The jury found that although Dr. Drury was negligent and his negligence was a proximate cause of death, "Mr. and/or Mrs. Shorter knowingly and voluntarily assum[ed] the risk of death to Mrs. Shorter from bleeding," and "attributed" 75 percent of the fault for her death to Mr. and Mrs. Shorter's refusal to authorize or accept a blood transfusion.

Petitioner appealed to Division I of the Washington Court of Appeals alleging, *inter alia*, that the trial court and jury violated the Free Exercise Clause of the First Amendment. Respondents cross-appealed, but did not appeal the jury's finding of medical negligence. The Appeals Court certified the case directly to the Washington Supreme Court. (App. 4a). In a 5-4 decision, the Washington Supreme Court affirmed the trial court in all respects. The Supreme Court majority opinion concluded that the refusal signed by the Shorters (App. 25a) was properly placed before the jury; that assumption of the risk was a valid defense and that jury instructions regarding same were not in error; and that there was no state action to substantiate a violation of the Free Exercise Clause of the First Amendment. Petitioner's Motion

For Reconsideration And To Take Additional Evidence was denied on March 25, 1985. (App. 24a).

Elmer Shorter, as personal representative of the estate of Doreen Shorter, now timely files this Petition for a Writ of Certiorari and prays that a writ issue on the following grounds:

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that his petition should be granted because the Washington Supreme Court "has decided an important question of federal law which has not been, but should be, settled by this Court, [and] has decided [this] federal question in a way in conflict with applicable decisions of this Court." (Rule 17.1(c), Rules of the Supreme Court.)

This case is one of first impression which is of national and continuing importance, as it directly involves at least 676,591 active Jehovah's Witnesses (as of March, 1985) and upwards to at least another 934,719 individuals, based on recorded attendance at the annual Memorial of the Ransom Sacrifice of Jesus Christ in 1984, as observed by Jehovah's Witnesses. This case further impacts all individuals who sign a release of liability and refuse a blood transfusion for nonreligious reasons, such as avoiding risk of contracting incurable diseases, including acquired immune deficiency syndrome (AIDS).

Although there are cases involving signed releases for the religious refusal to accept a blood transfusion, no reported case specifically involves the extent to which a competent adult may assume the risk of bleeding to death; or the extent to which civil liability is avoided by the release approved by the American Medical Association and used by most health care providers, when the physician has negligently caused the bleeding which requires the blood transfusion; or the extent to which assumption of the risk of death from negligently-caused bleeding, both before and after the negligence, abridges the Free Exercise Clause of the First Amendment. Health care providers throughout the United States are constantly confronted with these issues, yet there does not exist any established guidelines for resolving them.

Hospitals, physicians, and professional liability insurers need to know the extent to which they may rely on a release "from any responsibility whatever for unfavorable reactions

or any untoward results" due to a patient's refusal to permit a blood transfusion. Conflicting policy presently exists throughout the United States in dealing with blood transfusion releases such as the one involved in this case. If a blood transfusion is not given when a physician's medical judgment dictates otherwise, the physician is potentially liable for abandonment, or even malpractice. 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE (Matt. Bend.) ¶ 8.08 (1973); *United States v. George,* 239 F. Supp. 752 (D. Conn. 1965). If a blood transfusion is administered pursuant to a court order despite the patient's refusal, the physician is potentially liable for a violation of civil rights. *In re Brooks' Estate,* 205 N.E.2d 435 (Ill. 1965); *Holmes v. Silvercross Hospital,* 340 F. Supp. (D.C. Ill. 1972). As a result of the uncertainty in this area, a major East Coast hospital, Memorial Sloan-Kettering Cancer Center, has recently changed its official hospital policy "to discontinue the use of the special Jehovah's Witnesses consent form," and "Jehovah's Witnesses will be asked to sign the standard hospital consent forms without amendment" so that "the administration of blood or blood products . . . will not be withheld if in good medical judgment they are necessary." (App. 45a-46a). And a respected West Coast physician (OB/GYN), and the Deputy Director and Chief Counsel for a State Health Services agency, have recently coauthored an article for publication in a major medical journal which advances disregard for a signed release, and advances that a court order be obtained to permit a transfusion where needed. In the past, however, this has proved to be impractical in that it has frequently required late-night hospital conferences by the court, and has just as frequently resulted in litigation over the court's grant or denial of an order permitting transfusion, with the issue often becoming moot before the matter can be heard and resolved.

A release is a contract that blood not be administered during a particular medical procedure. If no blood is administered during that procedure, but the procedure is

negligently performed, should a subsequent release be necessary? May a relative alter or rescind the decision of an incompetent adult patient, who has previously, while competent, expressed his or her decision concerning a situation requiring a blood transfusion? Jehovah's Witnesses, and all other individuals who refuse to undertake a blood transfusion, need to know the extent to which they may rely on their right to maintain bodily integrity, and to exercise their religious convictions, without fear of either court-ordered transfusions or being subject to penalty.

1. The Jury's Finding That Doreen Shorter Assumed Partial Responsibility For Her Death In Refusing A Blood Transfusion Proscribed By Her Religious Convictions Violates Her First Amendment Right To Freely Exercise Her Religion When The Deemed Need For The Transfusion Arose Solely From The Negligence Of The Physician.

In its decision below, the Washington Supreme Court recognized the principle established by this Court that the receipt of an important benefit may neither be conditioned "upon conduct proscribed by a religious faith[, nor] denie[d] . . . because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Board Of The Indiana Employment Security Division*, 450 U.S. 707, 717-718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624, 634 (1981) [hereinafter cited as *Thomas v. Review Board*]. However, the Washington Supreme Court held that principle inapplicable to this case for the reason that state action was lacking, since this case involves a dispute between private individuals. That does not by itself, however, indicate an absence of state action, as long ago recognized by this Court in *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

Shelley held that judicial enforcement of private agreements involving constitutionally protected rights resulted in state action within the meaning of the Fourteenth

Amendment. Here, as in *Shelley,* even though the underlying dispute is between private individuals, the receipt in this case of damages for medical negligence, as well as the "deni[al of] such a benefit because of conduct mandated by religious belief" — i.e., the reduction in the award of damages due to Doreen Shorter's refusal to permit a blood transfusion — was the exclusive function of the jury before which this action was heard. To say that this case lacks state action because it involves a dispute between private individuals avoids the crucial issue: Whether the trial court's submission of the issue of assumption of risk to the jury violated the Free Exercise Clause of the First Amendment.

The action by the jury in reducing damages directly flowing as a natural consequence of the respondent's medical negligence was specifically denounced by this Court as state action in *Barrows v. Jackson,* 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

After *Shelley* had held that there was state action within the meaning of the Fourteenth Amendment so that the judiciary could not enforce the terms of a private real estate covenant without violating constitutionally protected rights, the issue then presented to this Court in *Barrows* was whether an award of monetary damages for breach of contract would similarly result in state action. This Court answered in the affirmative, stating:

> To compel [the co-covenantor] to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate . . . in the use of her property. The result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants. If the State may thus punish [her] for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not [her] voluntary choice but the State's choice that she observe her covenant or suffer damages. [*Barrows v. Jackson, supra,* 346 U.S. at 254.]

Submitting the issue of assumption of risk to the jury in the instant case (*see* App. 38a-44a) without a limiting instruction (such as petitioner's proposed instruction, *see* App. 26a), was state action in that it effectively permitted judiciary determination of Doreen Shorter's religious conduct, both before and after Dr. Drury's negligence, when the jury awarded damages, and permitted the jury to "den[y] such a benefit because of conduct mandated by religious belief." *Thomas v. Review Board, supra* at p. 12, 450 U.S. at 717.

New York Times Co. v. Sullivan, 376 U.S. 261, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), is dispositive of the state action issue presented in this case. In *New York Times*, Sullivan (a public official suing in his *personal* capacity) brought a civil action against a newspaper and four individuals (all *private* parties), alleging that he had been *personally* libeled by statements in an advertisement published by the newspaper. The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous per se" under the common law of the State of Alabama. The judge rejected the defendants' contentions that his rulings and instructions abridged the freedoms guaranteed by the First and Fourteenth Amendments. The jury subsequently awarded Sullivan $500,000.00. On appeal, the Alabama Supreme Court sustained the trial judge's rulings and instructions in all respects, and rejected defendants' constitutional contentions with the brief statements that "The First Amendment of the U.S. Constitution does not protect libelous publications," and "The Fourteenth Amendment is directed against State Action and not private action." *New York Times Co. v. Sullivan*, 273 Ala. 656, 676, 144 So.2d 25, 40 (1962).

This Court reversed the Alabama Supreme Court, because it had applied state defamation rules to the exclusion of First Amendment protections. This Court stated:

> We may dispose at the outset of . . . the proposition

> relied on by the State Supreme Court — that "The Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case. *Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms* of speech and press. *It matters not that that law has been applied in a civil action and that it is common law only, ... The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.* [Citations omitted.] [*New York Times Co. v. Sullivan, supra*, 376 U.S. at 265, 84 S.Ct. at 718 (emphasis added).]

The nature of the First Amendment right involved in this case directs this Court's inquiry to the defects in Washington State's scheme of common law assumption of risk doctrine when applied to the exclusion of First Amendment freedoms. Assumption of risk doctrine "can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *Id.*, 376 U.S. at 271.

During trial, petitioner's counsel objected, and timely took exception, to submission of the issue of assumption of risk to the jury as violating the Shorters' free exercise of their religious beliefs. (Please see App. 27a-28a in satisfaction of Rule 21.1(h), Rules of the Supreme Court). Immediately prior to considering those exceptions, the trial judge stated:

> Certainly I think I've indicated in the proposed Court's instructions that the refusal to take blood was a contributing factor, one of the proximate causes of death. That's clear. I think it's for the trier of fact to determine the allocation of that fault. [RP 734:11-16.]

The foregoing statement of the trial judge, his submission of assumption of risk to the jury, and his failure to limit the application of that doctrine, all show the extent to which that court must be found to have encouraged the effective release

of the respondent from the responsibility of placing Doreen Shorter in the position where she was forced to either violate her religious convictions or accept a recommended medical procedure — a medical procedure which respondent specifically knew from the outset would not be available for use in this case; and further, a medical procedure which would not have been found even to be necessary if respondent had properly recognized that he had severely injured Doreen Shorter and had taken immediate remedial action.

The action of the trial court thus resulted in significant state involvement in substantially releasing the respondent from his negligence because of Doreen Shorter's exercise of a religious conviction proscribing a recommended medical procedure. "Only by sifting facts and weighing circumstances can [this] nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45, 50 (1961). Thus, the trial court has taken affirmative action to sanction and make possible private acts which effectively deny with relative impunity the free exercise of a religious belief. This is nothing less than significant involvement in authorizing the denial of the free exercise of religion in the context of this case, and represents sufficient state action to violate the Fourteenth Amendment. *Cf. Reitman v. Mulkey,* 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967).

This petition for writ of certiorari should not be dismissed upon insistence that no Federal question is presented in this case, for the reason that the issue of assumption of risk on which the jury was instructed involved only principles of Washington common law. This Court has stated:

> [W]here the non-Federal ground is so interwoven with the other, as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction [to accept review of the case] is plain. [*Enterprise Irrig. Dist. v. Canal Co.,* 243 U.S. 157, 164, 37 S.Ct. 318, 321, 61 L.Ed. 644, 649 (1917).]

As stated in *Graham v. Gill*, 223 U.S. 643, 32 S.Ct. 396, 56 L.Ed. 586 (1912):

> In passing adversely on these objections [*i.e.*, by petitioner to instructions pertaining to assumption of risk] the trial court did not merely determine the weight or sufficiency of the evidence to prove a fact, but passed on the competency and legal effect of the evidence as bearing upon the question of Federal law .... Thus a Federal question was presented and decided. [*Id.*, 223 U.S. at 645.]

This case does not present a situation where a Jehovah's Witness undergoes an inherently risky surgical procedure, knows and appreciates that procedure to be risky, and refuses a blood transfusion necessitated by the risks of the procedure itself. That situation would appear to be one which may legitimately be regulated by common law principles of assumption of risk.

Rather, this case is a situation where Doreen Shorter, a Jehovah's Witness, underwent what she thought to be a routine medical procedure by the respondent doctor who, had he properly diagnosed the stage of her pregnancy, would have referred her to a more competent physician. He instead proceeded to use the most dangerous procedure which could have been used in the circumstances, unbeknownst to Doreen Shorter, and negligently perforated her uterus and inflicted other serious injury to her. These injuries were not caused by the inherent danger of the medical procedure undertaken, but rather were as a result of the doctor's negligence. This negligence caused severe bleeding, which through further negligence of the doctor went undetected, but which could have been successfully corrected by the doctor if he had promptly detected it and taken remedial action. Instead, the doctor's original negligence, compounded by his further negligence, caused uncontrolled internal bleeding for over two and one-half hours. The blood transfusion which was subsequently refused by Doreen Shorter was therefore

necessitated solely by the way in which the doctor performed his medical procedure, and he could have successfully corrected his mistake without the need for a blood transfusion if he had properly detected the bleeding. After the perforation had occurred and the bleeding went undetected, it is simply too late for assumption of risk to apply without trespassing into the realm of religious conduct unconditionally guaranteed by the First Amendment, and violating Doreen Shorter's right to exercise conduct consistent with her religious beliefs.

Future application of the present holding in this case will result in substantial pressure to coerce anyone who refuses a blood transfusion for religious reasons to modify his behavior and violate his beliefs in order to not be penalized for consequences arising solely as the direct result of a physician's medical negligence. As such, "a burden upon religion exists[, and, w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas v. Review Board, supra* at p. 12, 450 U.S. at 718.

> If follows that . . . it must appear . . . either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause [and the Establishment Clause] . . . . The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance . . . .
>
> The essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion. [*Wisconsin v. Yoder,* 406 U.S. 205, 214-215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972).]

2. The Washington Supreme Court Erred In Finding The Shorters Understood And Expressly Assumed The Risk Of Bleeding To Death, Either Before Or After The Negligence of Dr. Drury.

Petitioner respectfully requests that this Court scrutinize the finding of the Washington Supreme Court majority that the "record contains sufficient evidence from which a jury could have concluded the Shorters understood and expressly assumed the risk of bleeding to death as a result of Dr. Drury's negligence." (App. 17a). That finding should be reviewed by this Court since this case presents a situation

> where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. [*Fiske v. Kansas*, 274 U.S. 380, 385-386, 47 S.Ct. 655, 656-657, 71 L.Ed.2d 1108 (1927).]

See also Creswill v. Grand Lodge, 225 U.S. 246, 261, 32 S.Ct. 822, 827, 56 L.Ed. 1074 (1912); *Sterling v. Constantin*, 287 U.S. 378, 398, 53 S.Ct. 190, 195, 77 L.Ed. 375 (1932).

As stated in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964):

> This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." [Citation omitted.] In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." [Citations omitted.] We must "make an independent

> examination of the whole record," [citation omitted], so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of [First Amendment rights]. [*Id.*, 376 U.S. at 285; *see also Id.*, n. 26; *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963).]

The question in this case is one of alleged trespass across the line between religious conduct unconditionally guaranteed and conduct which may legitimately be regulated by common law principles of assumption of risk.

In reviewing the record of this case, the Washington Supreme Court found that:

> Dr. Drury . . . advised her there was a possibility of bleeding and perforation of the uterus . . . Examination of Mr. Shorter at trial revealed he was aware that the D and C posed the possibility, albeit remote, of internal bleeding. [App. 8a.]
>
> . . . .
>
> [Dr. Ott] did, however, advise Mrs. Shorter that "she could certainly bleed during the procedure and at trial confirmed she was aware of that possibility. Dr. Ott testified Mrs. Shorter responded to his warning by saying "she had faith in the Lord and that things would work out . . ." [App. 8a-9a.]
>
> . . . .
>
> The record shows that Dr. Ott advised Mrs. Shorter that her refusal to accept a transfusion could place her life in jeopardy if she bled from a D and C. Dr. Ott further testified there was a risk of bleeding with a routine D and C and that if she refused a transfusion she might die. Specifically, Dr. Ott stated he advised Mrs. Shorter that if a perforation occurred at the time of the D and C she would be in grave jeopardy. He also stated Mrs. Shorter said she knew this but remained firm in her conviction to refuse a blood transfusion. [App. 12a.]
>
> . . . .
>
> Mrs. Shorter consulted with Drs. Drury and Ott, both of whom advised her that the D and C, even if nonnegligently performed, could result in fatal bleeding. [App. 18a.]

In affirming the actions of the trial court, the Washington Supreme Court heavily relied on those findings, especially those concerning testimony of Dr. Alan E. Ott. Because of the importance of these findings to that decision, relevant portions of the Report of Proceeding which bear on the issue are presented at pages 29a-37a of the Appendix.

Contrary to the finding of the Washington Supreme Court, review of pages 34a-37a of the Appendix reveals that Dr. Alan E. Ott was concerned of bleeding risk for a condition which develops in cases of missed abortion known as "disseminated intravascular coagulopathy" (DIC), which is where a woman's blood-clotting factors become depleted so that even normal bleeding during minor surgical procedure is life-threatening, as in cases of hemophilia. Dr. Drury had not performed any tests upon Doreen Shorter to ascertain whether or not she had DIC. (RP 87:8-21). It is for this reason that Dr. Ott warned her that "her being a Jehovah's Witness would make the procedure more risky." (App. 36a-37a). Indeed, Doreen Shorter "[d]id . . . [not] indicate [to Dr. Ott] whether she had been told anything concerning risks involved in a D and C," and "[Dr. Ott] didn't ask her those questions and [he did]n't believe she mentioned anything about it." (App. 35a). There is absolutely nothing in Dr. Ott's testimony to enable the Washington Supreme Court to find that "Specifically, Dr. Ott stated he advised Mrs. Shorter that if a perforation occurred at the time of the D and C she would be in grave jeopardy," except in the context of DIC. Again, there is absolutely nothing in Dr. Ott's testimony to enable the Washington Supreme Court to find that Dr. Ott "advised her that the D and C, even if nonnegligently performed, could result in fatal bleeding," except in the context of DIC. However, Dr. Drury's negligence, *not* DIC, is what caused Doreen Shorter's uncontrolled bleeding for over two and one-half hours. (RP 188-16:16-23; 22:9-15; 228:11-232:8; 188-45:8-21; 188-49:20 to 188-50:6).

Just as the Shorters could not be *factually* found to have assumed the risk of bleeding to death from anything other

than DIC *prior* to Dr. Drury's negligence, they cannot be *legally* held to have assumed the risk of bleeding to death *after* they discovered the injuries inflicted by Dr. Drury. The principle established in *New York Times Co. v. Sullivan, supra* at p. 14, mandates that Washington common law doctrine of assumption of risk provide safeguards for free exercise of religion required by the First Amendment. To avoid placing a handicap upon the free exercise of religion, this Court should hold that if Doreen Shorter would otherwise be entitled to recovery against Dr. Drury for his negligence, she should not forfeit recovery for the natural and direct consequences of his negligence due to her exercise of her religious convictions. To hold to the contrary would be to effectively rule that Doreen Shorter had no defense to assumption of blood-loss risk for refusing a blood transfusion once bleeding had been established, unless she could persuade the jury that a blood transfusion would not have helped. An essentially insurmountable burden in view of the medical testimony in this case, notably reflecting the prevailing view in the medical community that blood transfusions are the modern-day sacrosant procedure in almost any given type of surgery, and that "[w]hole blood appears to remain the overwhelming modality of choice for fluid resuscitation, *in spite of the known dangers associated with its use.*" *J.A.M.A.*, Vol. 215, No. 13, Mar. 29, 1971, at 2077 (emphasis added). The fact of the matter is that no one knows for certain what the results would nave been had Doreen Shorter been transfused. It is known for sure, however, that with a blood transfusion goes the substantial risk of transmission of incurable diseases such as serum hepatitis and acquired immune deficiency syndrome (AIDS). Blood transfusions must seriously be regarded as involving considerable danger and even as potentially lethal. *See, e.g.*, WINTROBE, CLINICAL HEMATOLOGY, 1974, at 474: *Le Concours Medical*, Apr. 1, 1972, at 2598; U.S. Gov't., *Oasis*, Feb. 1976, at 23-24. Washington statutory law (R.C.W. 70.54.120), consistent with a majority of states, considers

blood transfusion to be the rendering of a service rather than the sale of a product. The transfusion recipient is statutorily denied the right to rely on any implied warranty of merchantability or fitness for a particular purpose under the state's Uniform Commercial Code or otherwise. Generally, no civil liability may result for contraction of hepatitis or malaria from the procurement, processing, storage, distribution, administration, or transfusion of blood or blood products, except in the case of demonstrated wilful or negligent conduct.

There was no evidence presented in this case that Doreen Shorter was informed of any risk associated with accepting a blood transfusion, nor was she informed that she would be waiving any civil right to recover for damages arising from contaminated blood. Therefore, she could not have given her informed consent to a blood transfusion, so that even if it *was* non-negligently performed, and she survived it, she would still have a cause of action against the doctor for battery. On the other hand, if she had died from hepatitis, AIDS, or any other disease or complication, even though the transfusion was *non*-negligent, the majority of courts would hold that the doctor's failure to make a proper disclosure would still subject the doctor to suit for medical malpractice.

Despite the known dangers, several medical persons unqualifiedly opined in this case that Doreen Shorter would have survived the negligence of Dr. Drury if she would have been transfused. Certainly the jury was influenced by these opinions, and the jury instructions regarding assumption of risk (App. 38a-43a) were clearly broad enough to permit the jury to consider Doreen Shorter's conduct occurring *after* Dr. Drury's negligence. The trial court's instruction No. 5 set the stage to permit the jury to conclude that Doreen Shorter assumed the risk of her death for exercising her religious convictions after Dr. Drury inflicted injury, as follows:

> Defendant [Dr. Drury] claims that plaintiffs voluntarily assumed the risk of Doreen Shorter's death by

> their refusal to accept transfusions of blood or blood products before *and after* surgery. [Emphasis added.]

Common law doctrine cannot be applied to the exclusion of First Amendment protections. Washington assumption of risk doctrine requires that the individual assuming risk of injury have full knowledge before the injury of the facts which create the risk, knowledge of the specific risk itself, and knowledge of the magnitude of the risk involved. Additionally, that individual's conduct is assuming the risk must be "voluntary." However:

> The plaintiff's acceptance of the risk is not to be regarded as voluntary where the defendant's tortious conduct has forced upon h[er] a choice of courses of conduct, which leaves h[er] no reasonable alternative to taking h[er] chances. *The defendant who, by his own wrong, has compelled the plaintiff to choose between two evils cannot be permitted to say that the plaintiff is barred from recovery because [s]he has made the choice.* Therefore, when the defendant is under a duty to the plaintiff, and his breach of duty compels the plaintiff to encounter the particular risk in order to avert other harm to h[er]self, h[er] acceptance of the risk is not voluntary, and [s]he is not barred from recovery . . . *It is true likewise where the plaintiff is compelled to accept the risk in order to exercise or protect a right or privilege, of which the defendant has no privilege to deprive h[er]. The existence of an alternative course of conduct which would avert the harm,* or protect the right or privilege, *does not make the plaintiff's choice voluntary, if the alternative is one which [s]he cannot reasonably be required to accept.* [RESTATEMENT (Second) TORTS § 496E, Comment C, p. 577 (emphasis added).]

It is undisputed that the sole reason that a blood transfusion was necessary in this case was due to the negligent infliction of injuries to Doreen Shorter by Dr. Drury. It was only at that point that Doreen Shorter risked the prospect of death from loss of blood. Dr. Drury's actions clearly forced Doreen Shorter into a position where she was compelled to

choose between taking a blood transfusion or obeying her sincere and heartfelt beliefs as to the Word of God. She was repeatedly pressed to permit to be transfused and "to suggest repeatedly the imminence of death without blood [would certainly] place a strain on her religious convictions." *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1007 (D.C. Cir. 1964), *cert. denied, Jones v. President & Directors of Georgetown College, Inc.*, 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964). However, the prospect of foresaking her constitutionally protected religious convictions cannot be held to be a reasonable alternative to correct the damage inflicted by Dr. Drury. Dr. Drury's own wrong compelled Doreen Shorter to choose between two evils, and this clearly cannot be a voluntary choice within the meaning of assumption of risk doctrine when applied within the scrutiny of First Amendment protections.

Dr. Drury was informed from the outset of Doreen Shorter's religious conviction that precluded her from accepting a blood transfusion, and he certainly had no right to deprive her the exercise of that constitutionally protected conviction. Assumption of risk should therefore not have been a defense in this case. *Kanelos v. Kettler*, 406 F.2d 951, 955 (9th Cir. 1968).

The Washington Supreme Court held that the risk the Shorters assumed was not the risk of negligent treatment, but rather the risk of death from bleeding if bleeding occurred for any reason and a blood transfusion was refused, "including where the doctor made what would otherwise have been correctable surgical mistake." (App. 18a). This simply should not be the rule in this case, and the release (App. 25a) should not make it any more so. As one medical expert stated in answer to a question in this case:

> Q: Doctor, there's evidence in this case that Mrs. Shorter told Dr. Drury on the occasion of the first visit she was a Jehovah's Witness, wouldn't accept blood. Now, in view of that fact, do you have an opinion as

to what, if any, additional risk would be posed to the surgeon . . . contemplating the D & C procedure with a sharp curette even under 12 weeks?

. . . .

A: I think all of us as physicians worry about that. We know that in this type of procedure there can be a significant blood loss and *we have to accept that risk if we accept them as a patient.*

[RP 582:18-583:6 (emphasis added).]

This Court should hold that the U.S. Constitution delimits a State's power to reduce damages under assumption of risk doctrine for refusing a blood transfusion for religious reasons in an action brought against a physician for his negligent conduct. Therefore, pursuant to *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1963):

> Since the trial judge did not instruct the jury to differentiate between [assumption of risk on the basis of informed consent *before* the D and C, and assumption of risk for refusing a transfusion *after* bleeding became apparent due to Dr. Drury's negligence], it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the verdict returned. [*See* App. 1a-3a.] Because of this uncertainty, the judgment must be reversed and the case remanded. [*Id.*, 376 U.S. at 284.]

3. The Washington Supreme Court Erred In Failing To Consider Evidence On The Issue Of Assumption Of Risk Surfacing After Publication Of The Decision On Review.

The instructions submitted to the jury permitted the jury to find that Doreen Shorter assumed the risk of death from bleeding after Dr. Drury's negligence and massive bleeding became apparent. Doreen Shorter was told that she would bleed to death if she did not consent to a blood transfusion once this bleeding was recognized. She continued to refuse to give such consent in order to obey God's Law. However, medical experts opined that Doreen Shorter would have survived despite Dr. Drury's negligence if she would have been transfused at the time of her subsequent remedial

surgery. There was no medical opinion to the contrary, despite the known dangers associated with a blood transfusion. *See* p. 22 *supra.* This surely was a factor considered by the jury when instructed to consider whether Doreen Shorter assumed the risk of her death.

The Washington Supreme Court majority opinion stated that "Doctors for both parties agreed a transfusion in substantial probability would have saved Doreen Shorter's life." (App. 10a). The news media published that statement when the decision was released to the press.

When Doreen Shorter died, present at the hospital with petitioner was Randall D. Austin. Mr. Austin was an Elder at the Kingdom Hall of Jehovah's Witnesses attended by Doreen Shorter and petitioner. Mr. Austin had come to the hospital for spiritual upbuilding if he was needed.

Prior to publication of the Washington Supreme Court decision, petitioner had not conversed with Mr. Austin regarding this case, nor did Mr. Austin know that petitioner had instituted this action. When Mr. Austin read the media account of the opinion, he came forward and informed petitioner that respondent Dr. Drury had made the statement after Doreen Shorter's death that he was glad that Doreen Shorter maintained her religious convictions because a blood transfusion would not have saved her. This important information discovered by petitioner as a result of media publication of the Supreme Court's opinion was submitted by affidavit (App. 47a-49a) to the Supreme Court with a Motion To Take Additional Evidence. The motion was denied, and petitioner had thus been denied through no fault of his own, the opportunity for a full hearing in this matter on an important legal issue inextricably intertwined with finding of fact, and has effectively been denied access to legal redress through his day in court. This case should be remanded for a further determination of the facts and circumstances surrounding Doreen Shorter's death.

4. A Medical Liability Release Form Signed By A Competent Adult Should Be Held To Be Inviolate, Even In The Marriage Arrangement.

The decisions of this Court make it clear that religious beliefs and practices are in a special class protected against governmental encroachment. *See, e.g., Wisconsin v. Yoder,* 406 U.S. 205, 72 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). A religious belief is necessarily personal to the individual, so that an individual's sincere religious belief, even if not shared by all members of a religious sect, is still within the protection of the First Amendment. *See Thomas v. Review Board,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981).

It should be axiomatic that if a blood transfusion issue arose between marriage partners who are unevenly yolked — *e.g.,* one spouse observes the tenets of Catholicism while the other spouse observes the tenets of Jehovah's Witnesses — the respective religious beliefs of each party must still be held inviolable despite the intimacy of the marriage arrangement. Contrary to seemingly current trends, marriage is designed to be "for better or for worse," and this will necessarily include disagreements over such central issues as religious doctrine. Therefore, the decision of an adult Jehovah's Witness in refusing a blood transfusion must be able to stand inviolate from the objection of a nonbelieving spouse. This should be true whether or not the adult Jehovah's Witness is rendered incapable to exercise the right to refuse a blood transfusion. The right to religious freedom should not be forfeited simply because the person having the right has lost the ability to assert it. Furthermore, the assertion by the nonbelieving spouse of beliefs contrary to those held by the incapacitated spouse would result in breach of significant moral obligation to the incapacitated spouse who, had s/he been able to do so, would have exercised any strongly held religious convictions.

The foregoing analysis should apply with equal force in the case of a married couple who are both Jehovah's

Witnesses. *Contra, Application of the President & Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1008 (D.C. Cir. 1964), *cert. denied, Jones v. President & Directors of Georgetown College, Inc.*, 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964). This would maintain personal religious integrity and obviate judicial determinations strained by the emotions of human conscience. *See, e.g., Id.* (conscience of Court substituted for religious integrity in authorizing blood transfusion where personal conscience proscribed consent to, rather than receipt of, a blood transfusion); *accord, United States v. George*, 239 F. Supp. 752 (D. Conn. 1965); *cf., In the Matter of Osborne*, 294 A.2d 372 (D.C. 1972) (Religious integrity upheld and no transfusion authorized when personal conscience proscribed receipt of blood transfusion under any circumstances).

5. The Trial Court Erred In Failing To Limit The Jury To Consider Only Assumption Of Risk On The Part Of Doreen Shorter When Awarding Damages.

Express assumption of particularized risk in this case required that Doreen Shorter be found to have recognized and understood (appreciated) the particular risk of bleeding to death as a result of Dr. Drury's negligence, and that she voluntarily chose to encounter that bleeding risk. Knowledge of the danger and voluntary exposure to it are measured *subjectively — i.e.*, by what she personally was aware of and intended, and *not* by what a reasonable person would know and do. It logically follows that express assumption of risk necessarily precludes the inputing of another's knowledge of the risk. Therefore, it is wholly irrelevant to this case that "Examination of *Mr.* Shorter at trial revealed he was aware that the D and C posed the possibility, albeit remote, of internal bleeding." [Emphasis added.] However, the notion that *Mr.* Shorter could assume the risk and impute the same to Doreen Shorter pervades the language of the jury instructions. It was therefore an error for the trial court to permit the jury to consider the knowledge of Mr. Shorter, rather

than to focus on the knowledge of Doreen Shorter, in awarding damages to the Estate of Doreen Shorter; and this case should be remanded for a new trial on that basis since it cannot be said with certainty that reduction in damages was due wholly to a finding of assumption of risk by *Mr.* Shorter, or by *Doreen* Shorter, or *both. New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

CONCLUSION

Because the federal question presented is one of first impression of the utmost importance, and the Washington Supreme Court has decided it in a way in conflict in principle and application of decisions of this Court, petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Washington Supreme Court.

Respectfully submitted, this 21st day of June, 1985.

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APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

ELMER E. SHORTER, as personal representative of the Estate of DOREEN V. SHORTER, Deceased,	)	No: 80-2-01898-0
Plaintiff,	)	JUDGMENT ON THE VERDICT
vs.	)	
ROBERT E. DRURY, M.D., and JANE DOE DRURY, his wife,	)	
Defendants.	)	

THIS MATTER having come on duly and regularly for trial on October 6, 1982, before the undersigned Judge of the above-entitled court, sitting with a twelve-person jury; plaintiff appearing personally and through his attorney, Denny Anderson, of the firm Davies, Roberts, Reid, Anderson & Wacker, and the defendant Robert E. Drury, M.D., appearing personally and through his attorneys, Daniel E. Tolfree and Mary H. Spillane, of the firm of Williams, Lanza, Kastner & Gibbs, the trial having been held commencing on Wednesday, October 6, 1982 and ending on Friday, October 15, 1982, and the plaintiff having submitted evidence and rested, the court having denied defendant's Motion for a Directed Verdict, and the issues in this case thereafter having been submitted to the jury for determination pursuant to the Court's instruction; and the jury having

answered interrogatories set forth in the Special Verdict Form as follows:

> WE, THE JURY, make the following answers to the questions submitted by the Court:
>
> **QUESTION NO. 1:** Was the defendant Dr. Robert E. Drury negligent?
>
> ANSWER: YES (Yes or No)
>
> INSTRUCTION: If your answer to Question No. 1 is yes, go to Question No. 2. If your answer to Question No. 1 is no, do not answer any further questions.
>
> **QUESTION NO. 2:** Was the negligence of the defendand [sic] Dr. Robert E. Drury, a proximate cause of the death of Doreen Shorter?
>
> ANSWER: YES (Yes or No)
>
> INSTRUCTION: If your answer to Question No. 2 is yes, go to Question No. 3. If your answer to Question No. 2 is no, do not answer any further questions.
>
> **QUESTION NO. 3:** What is the total amount of damage to plaintiffs proximately caused by the death of Doreen Shorter:
>
> ANSWER: $412,000
>
> **QUESTION NO. 4:** Did Mr. and/or Mrs. Shorter knowingly and voluntarily assume the risk of death to Mrs. Shorter from bleeding under the facts of this case?
>
> ANSWER: YES (Yes or No)
>
> INSTRUCTION: If your answer to Question No. 4 is yes, go to Question No. 5. If your answer is no, do not answer any further questions.
>
> **QUESTION NO. 5:** Using 100% as the total combined conduct of Mr. and Mrs. Shorter and Dr. Drury which contributed to the death of Mrs. Shorter, what percentage of such conduct is attributable to Mr. and Mrs. Shorter:
>
> ANSWER: 75%

and said verdict having been duly and regularly received, filed, and recorded; and the court having determined that $309,000.00 shall be deducted from $412,000.00 in

accordance with the special verdict of the jury leaving $103,000.00 to be entered as judgment, now, therefore, it is hereby,

ORDERED, ADJUDGED AND DECREED that the plaintiff is awarded judgment against the defendants in the sum of $103,000.00, and his taxable costs herein.

DONE IN OPEN COURT this /s/25th day of /s/January, 1983.

/s/ Robert A. Bibb
JUDGE

Presented By:
WILLIAMS, LANZA, KASTNER & GIBBS

By /s/ Daniel E. Tolfree
Daniel E. Tolfree
Attorneys for Defendant

Copy Received,
Notice of Presentation Waived,
Approved as to Form:

DAVIES, ROBERTS, REID, ANDERSON & WACKER

By [not signed]
Denny Anderson
Attorneys for Plaintiff

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

ELMER SHORTER, as personal representative of the Estate of DOREEN V. SHORTER, Deceased,	)	No. 12829-1-I
Appellants,	)	ORDER OF CERTIFICATION
vs.	)	
ROBERT E. DRURY, and JANE DOE DRURY, his wife,	)	
Respondents.	)	

A panel of judges has reviewed this appeal prior to a hearing thereon and has determined that the issue presented, to wit:

> Whether assumption of the risk is available as a defense where a patient has refused and continues to refuse a blood transfusion on religious grounds and the necessity for such a transfusion is attributable to the negligence of the doctor;

is an issue of broad public import requiring prompt and ultimate determination by the Supreme Court. This case meets the criteria of RCW 2.06.030(d); Now, therefore it is hereby

ORDERED that this case is certified to the Supreme Court for such determination as that court deems appropriate.

Done this /s/24 day of May, 1984.

/s/

/s/

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[No. 50601-9. En Banc. January 11, 1985.]

ELMER E. SHORTER, *as Personal Representative, Appellant*, v. ROBERT E. DRURY, ET AL, *Respondents*.

[1] **Release — Medical Treatment — Refusal of Treatment — Release From Liability — Validity and Effect.** A patient's refusal to permit a particular medical treatment and his release of others from the consequences of the refusal, if made knowingly and voluntarily, is not violative of public policy. Such a release does not, however, shield those released from liability for their own negligence in treating the patient.

[2] **Negligence — Assumption of Risk — Comparative Negligence — Effect.** The defense of a plaintiff's express and reasonable assumption of a risk was not abrogated by the enactment of the former comparative negligence statute (RCW 4.22).

[3] **Negligence — Assumption of Risk — Elements.** A plaintiff expressly assumes a specific risk by knowing it, appreciating and understanding its nature, and voluntarily choosing to incur it.

[4] **Medical Treatment — Refusal of Treatment — Assumption of Risk — Physician's Negligence.** The prohibition against assuming the risk of another's negligence is not violated by a patient's assuming the risks resulting from his refusal of a medical treatment, even if the consequences of the patient's refusal are aggravated by the attending physician's negligence.

[5] **Constitutional Law — Freedom of Religion — State Involvement — Necessity.** A dispute between private litigants does not invoke First Amendment religious freedom protections.

PEARSON, UTTER, BRACHTENBACH, and DORE, JJ., dissent by separate opinion; CALLOW, J., did not participate in the disposition of this case.

Nature of Action: Medical malpractice action against a physician whose patient had died from loss of blood following an operation. The decedent had signed a form releasing the physician from responsibility for "unfavorable reactions" or "untoward results" due to her refusal to accept blood transfusions for religious reasons.

Superior Court: The Superior Court for Snohomish County, No. 80-2-01898-0, Robert C. Bibb, J., on January 25, 1983, entered a judgment on a verdict which reduced

the plaintiff's damages by 75 percent based on the decedent's assumption of the risk of death from bleeding.

Supreme Court: Holding that the release was validly executed, did not violate public policy, and did not absolve the physician from liability for his negligence, that there was sufficient evidence that the decedent had expressly assumed the risk of bleeding to death as the result of the physician's negligence, and that no violation of religious freedom had occurred, the court *affirms* the judgment.

Davies, Roberts, Reid, Anderson & Wacker, by *Denny Anderson*, for appellant.

Williams, Lanza, Kastner & Gibbs, by *Mary H. Spillane*, for respondents.

DOLLIVER, J.—This is an appeal from a wrongful death medical malpractice action arising out of the bleeding death of a hospital patient who, for religious reasons, refused a blood transfusion. Plaintiff, the deceased's husband and personal representative, appeals the trial court's judgment on the verdict in which the jury reduced plaintiff's wrongful death damages by 75 percent based on an assumption of risk by the Shorters that Mrs. Shorter would die from bleeding. The defendant doctor appeals the judgment alleging that a plaintiff–signed hospital release form completely barred the wrongful death action. Alternatively, defendant asks that we affirm the trial court's judgment on the verdict. Defendant does not appeal the special verdict in which the jury found the defendant negligent.

The deceased, Doreen Shorter, was a Jehovah's Witness, as is her surviving husband, Elmer Shorter. Jehovah's Witnesses are prohibited by their religious doctrine from receiving blood transfusions.

Doreen Shorter became pregnant late in the summer of 1979. In October of 1979, she consulted with the defendant, Dr. Robert E. Drury, a family practitioner. Dr. Drury diagnosed Mrs. Shorter as having had a "missed abortion". A

missed abortion occurs when the fetus dies and the uterus fails to discharge it.

When a fetus dies, it is medically prudent to evacuate the uterus in order to guard against infection. To cleanse the uterus, Dr. Shorter recommended a "dilation and curettage" (D and C). There are three alternative ways to perform this operation. The first is with a curette, a metal instrument which has a sharp–edged hoop on the end of it. The second, commonly used in an abortion, involves the use of a suction device. The third alternative is by use of vaginal suppositories containing prostaglandin, a chemical that causes artificial labor contractions. Dr. Drury chose to use curettes.

Although the D and C is a routine medical procedure, there is a risk of bleeding. Each of the three principal methods for performing the D and C presented, to a varying degree, the risk of bleeding. The record below reflects that the curette method which Dr. Drury selected posed the highest degree of puncture–caused bleeding risk due to the sharpness of the instrument. The record also reflects, however, that no matter how the D and C is performed, there is always the possibility of blood loss.

Dr. Drury described the D and C procedure to Mr. and Mrs. Shorter. He advised her there was a possibility of bleeding and perforation of the uterus. Dr. Drury did not discuss any alternate methods in which the D and C may be performed. Examination of Mr. Shorter at trial revealed he was aware that the D and C posed the possibility, albeit remote, of internal bleeding.

The day before she was scheduled to receive the D and C from Dr. Drury, Mrs. Shorter sought a second opinion from Dr. Alan Ott. Mrs. Shorter advised Dr. Ott of Dr. Drury's intention to perform the D and C. She told Dr. Ott she was a Jehovah's Witness. Although he confirmed the D and C was the appropriate treatment, Dr. Ott did not discuss with Mrs. Shorter the particular method which should be used to perform it. He did, however, advise Mrs. Shorter that "she could certainly bleed during the procedure" and at

trial confirmed she was aware of that possibility. Dr. Ott testified Mrs. Shorter responded to his warning by saying "she had faith in the Lord and that things would work out . . ."

At approximately 6 a.m. on November 30, Mrs. Shorter was accompanied by her husband to Everett General Hospital. At the hospital the Shorters signed the following form (underlining after heading indicates blanks in form which were completed in handwriting):

GENERAL HOSPITAL OF EVERETT
REFUSAL TO PERMIT BLOOD TRANSFUSION

Date November 30, 79 Hour 6:15 a.m.

I request that no blood or blood derivatives be administered to
Doreen V. Shorter
during this hospitalization. I hereby release the hospital, its personnel, and the attending physician from any responsibility whatever for unfavorable reactions or any untoward results due to my refusal to permit the use of blood or its derivatives and I fully understand the possible consequences of such refusal on my part.

[/s/ Doreen Shorter]
Patient
[/s/ Elmer Shorter]
Patient's Husband or Wife

The operation did not go smoothly. Approximately 1 hour after surgery, Mrs. Shorter began to bleed internally and go into shock. Emergency exploratory surgery conducted by other surgeons revealed Dr. Drury had severely lacerated Mrs. Shorter's uterus when he was probing with the curette.

Mrs. Shorter began to bleed profusely. She continued to refuse to authorize a transfusion despite repeated warnings by the doctors she would likely die due to blood loss. Mrs. Shorter was coherent at the time she refused to accept blood. While the surgeons repaired Mrs. Shorter's perforated uterus and abdomen, Dr. Drury and several other doctors pleaded with Mr. Shorter to permit them to trans-

fuse blood into Mrs. Shorter. He likewise refused. Mrs. Shorter bled to death. Doctors for both parties agreed a transfusion in substantial probability would have saved Doreen Shorter's life.

Mr. Shorter thereafter brought this wrongful death action alleging Dr. Drury's negligence proximately caused Mrs. Shorter's death; the complaint did not allege a survival cause of action. The release was admitted into evidence over plaintiff's objection. Plaintiff took exception to jury instructions numbered 13 and 13A which dealt with assumption of the risk.

The jury found Dr. Drury negligent and that his negligence was "a proximate cause of the death of Doreen Shorter". Damages were found to be $412,000. The jury determined, however, that Mr. and/or Mrs. Shorter "knowingly and voluntarily" assumed the risk of bleeding to death and attributed 75 percent of the fault for her death to her and her husband's refusal to authorize or accept a blood transfusion. Plaintiff was awarded judgment of $103,000. Both parties moved for judgment notwithstanding the verdict. The trial court denied both motions. Plaintiff appealed and defendant cross-appealed to the Court of Appeals, which certified the case pursuant to RCW 2.06-.030(d).

The three issues before us concern the admissibility of the "Refusal To Permit Blood Transfusion" (refusal); whether assumption of the risk is a valid defense and if so, whether there is sufficient evidence for the jury to have found the risk was assumed by the Shorters; and whether the submission of the issue of assumption of the risk to the jury violated the free exercise clause of the First Amendment. The finding of negligence by Dr. Drury is not appealed by defendant.

I

Plaintiff argues the purpose of the refusal was only to release the defendant doctor from liability for not transfusing blood into Mrs. Shorter had she required blood during

the course of a nonnegligently performed operation. He further asserts the refusal as it applies to the present case violates public policy since it would release Dr. Drury from the consequences of his negligence.

Defendant concedes a survival action filed on behalf of Mrs. Shorter for her negligently inflicted injuries would not be barred by the refusal since enforcement would violate public policy. Defendant argues, however, the refusal does not release the doctor for his negligence but only for the consequences arising out of Mrs. Shorter's voluntary refusal to accept blood, which in this case was death.

While the rule announced by this court is that contracts against liability for negligence are valid except in those cases where the public interest is involved (*McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 486 P.2d 1093 (1971)), the refusal does not address the negligence of Dr. Drury. This being so it cannot be considered as a release from liability for negligence. *Cf. Hewitt v. Miller*, 11 Wn. App. 72, 521 P.2d 244 (1974). Whether a release which specifically absolved Dr. Drury from his negligence would have been valid or against public policy need not be decided and we reserve any comment on that issue. *See Blide v. Rainier Mountaineering, Inc.*, 30 Wn. App. 571, 573–74, 636 P.2d 492 (1981); *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963); Annot., *Validity and Construction of Contract Exempting Hospital or Doctor From Liability for Negligence to Patient*, 6 A.L.R.3d 704, 705 (1966 & Supp. 1984).

Plaintiff categorizes the refusal as an all or nothing instrument. He claims that if it is a release of liability for negligence it is void as against public policy and if it is a release of liability where a transfusion is required because of nonnegligent treatment then it is irrelevant. We have already stated the document cannot be considered as a release from liability for negligence. The document is more, however, than a simple declaration that the signer would refuse blood only if there was no negligence by Dr. Drury. It is a specific request that no blood or blood derivatives be

administered to Mrs. Shorter. The attending physician is released from "*any responsibility whatever* for unfavorable reactions or *any untoward results* due to my refusal to permit the use of blood or its derivatives." (Italics ours.) The release signed by the Shorters further stated: "I fully understand the possible consequences of such refusal on my part."

[1] We find the refusal to be valid. There was sufficient evidence for the jury to find it was not signed unwittingly but rather voluntarily. *See Baker v. Seattle*, 79 Wn.2d 198, 484 P.2d 405 (1971); Restatement (Second) of Torts § 496B (1965). The record shows Dr. Ott advised Mrs. Shorter that her refusal to accept a transfusion could place her life in jeopardy if she bled from a D and C. Dr. Ott further testified there was a risk of bleeding with a routine D and C and that if she then refused a transfusion she might die. Specifically, Dr. Ott stated he advised Mrs. Shorter that if a perforation occurred at the time of the D and C she would be in grave jeopardy. He also stated Mrs. Shorter said she knew this but remained firm in her conviction to refuse a blood transfusion. Knowing this, and in response to their religious beliefs, the Shorters signed the refusal. In refusing a blood transfusion, the Shorters were acting under the compulsion of circumstances. The compulsion, however, was created by the religious convictions of the Shorters not by the tortious conduct of defendant. *See* Restatement (Second) of Torts § 496E, comments *b*, *d* (1965).

We also held the release was not against public policy. We emphasize again the release did not exculpate Dr. Drury from his negligence in performing the surgery. Rather, it was an agreement that Mrs. Shorter should receive no blood or blood derivatives. The cases cited by defendant, *Tunkl v. Regents of Univ. of Cal.*, *supra*; *Colton v. New York Hosp.*, 98 Misc. 2d 957, 414 N.Y.S.2d 866 (1979); *Olson v. Molzen*, 558 S.W.2d 429 (Tenn. 1977), all refer to exculpatory clauses which release a physician or hospital from all liability for negligence. The Shorters specifically accepted the risk which might flow from a refusal

to accept blood. Given the particular problems faced when a patient on religious grounds refuses to permit necessary or advisable blood transfusions, we believe the use of a release such as signed here is appropriate. *See* Ford, *Refusal of Blood Transfusions by Jehovah's Witnesses*, 10 Cath. Law. 212 (1964). Requiring physicians or hospitals to obtain a court order would be cumbersome and impractical. Furthermore, it might subject the hospital or physician to an action under 42 U.S.C. § 1983. *See Holmes v. Silver Cross Hosp.*, 340 F. Supp. 125 (N.D. Ill. 1972). The alternative of physicians or hospitals refusing to care for Jehovah's Witnesses is repugnant in a society which attempts to make medical care available to all its members.

We believe the procedure used here, the voluntary execution of a document protecting the physician and hospital and the patient, is an appropriate alternative and not contrary to the public interest.

If the refusal is held valid, defendant asserts it acts as a complete bar to plaintiff's wrongful death claim. We disagree. While Mrs. Shorter accepted the consequences resulting from a refusal to receive a blood transfusion, she did not accept the consequences of Dr. Drury's negligence which was, as the jury found, a proximate cause of Mrs. Shorter's death. Defendant was not released from his negligence. We next consider the impact of the doctrine of assumption of the risk on this negligence.

II

Plaintiff argues the trial court erred in admitting jury instructions 13 and 13A on the ground that assumption of the risk is no longer a recognized defense in Washington, except in products liability. Plaintiff alternatively argues that even if assumption of the risk remains a viable defense, there was no evidence in the present case from which the jury may have found that Mrs. Shorter, in signing the release form, knowingly and voluntarily assumed the risk that Dr. Drury would negligently perform the D and C, proximately causing her death.

Defendant argues the assumption of the risk doctrine remains viable after enactment of the former comparative negligence statute (RCW 4.22) in cases in which the plaintiff expressly, as opposed to impliedly, assumes the risk of the defendant's negligence. He further asserts Mrs. Shorter, when she signed the blood transfusion release, expressly assumed the risk of bleeding to death even though her chances of bleeding to death may have been increased by his negligence.

Jury instruction 13 provided:

> Assumption of the risk is conduct on the part of a person claiming injury or damage which is a proximate cause of the injury or damage complained of.
>
> If you find that Mr. or Mrs. Shorter assumed a risk which was a proximate cause of Mrs. Shorter's death, you must determine the degree of such conduct, expressed as a percentage, attributable to Mr. and Mrs. Shorter. . . . Using 100% as to the total combined conduct of the parties (negligence and assumption of the risk) which contributed to the damage to the plaintiff, you must determine what percentage of such conduct is attributable to Mr. or Mrs. Shorter.

Jury instruction 13A provided:

> A person who fully understands a risk of harm to himself or a member of his family and who voluntarily submits to such risk under circumstances which manifest his willingness to assume the risk is not entitled to recover for harm within that risk.
>
> In this case Mr. and Mrs. Shorter did not voluntarily assume the risk of negligence by defendant, but did voluntarily assume the risks relating to the refusal of transfusions of blood or blood products.

In *Lyons v. Redding Constr. Co.*, 83 Wn.2d 86, 515 P.2d 821 (1973), decided before the enactment of the comparative negligence statute, we analyzed the assumption of risk doctrine. Plaintiff directs our attention to the following language in *Lyons* in which this court predicted that enactment of the comparative negligence statute would sound the death knell for the defense of assumption of risk.

> The decision reached here today has been long-

> aborning. Somewhat ironically, its effects will be short–lived. The assumption of risk in special and limited situations or contributory negligence on the part of a plaintiff has the effect of denying all recovery regardless of degree of fault. But this *all or nothing result* will be abandoned or changed on April 1, 1974, because the Washington state legislature has recently enacted a comparative negligence statute [RCW 4.22.010, repealed in 1981 (Laws of 1981, ch. 27, p. 112), but in effect at the time of the events leading to this action] . . .
>
> . . . Accordingly, it has been held the effect of the comparative negligence standard shall be to completely abrogate the assumption of risk doctrine as known and applied heretofore.

Lyons, at 95–96.

[2] Plaintiff misreads *Lyons* in asserting that it abandoned the defense of assumption of risk in toto. The reference of the *Lyons* court to the gloomy future of the assumption of risk doctrine was directed only at the form of assumption of risk where the plaintiff's conduct is contributorially negligent. This is referred to as "unreasonable assumption of risk". W. Keeton, *Torts* § 68, at 497 (5th ed. 1984) (hereinafter W. Keeton). Other forms of assumption of risk, *e.g.*, those not involving unreasonable plaintiff conduct, were not at issue in *Lyons*.

Courts and commentators have struggled with the issue as to whether and to what extent the defense of "reasonable" assumption of risk survives the enactment of comparative negligence statutes. *See* W. Keeton § 68, at 495 n.54 (citing commentators); Annot., *Effect of Adoption of Comparative Negligence Rules on Assumption of Risk*, 16 A.L.R.4th 700, 711 (1982). To determine whether the giving of the assumption of risk jury instruction was error, the type of risk the Shorters are alleged to have assumed must be identified.

Prosser classifies the forms of assumption of risk as follows: express, implied primary, implied reasonable, and implied unreasonable. W. Keeton § 68, at 496. It is not argued the Shorters' conduct in assuming the risk is not "implied unreasonable" assumption of the risk; nor do we

need to determine whether "implied primary" or "implied reasonable" assumption of risk survived the comparative negligence statute. *See* W. Keeton § 68, at 496–98. We confine our analysis to the validity of express assumption of risk and the extent to which it applies in the circumstances of this case.

Express assumption of the risk is a defense when:

> [T]he plaintiff, in advance, has given his *express* consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone.

W. Keeton § 68, at 480. Jurisdictions with comparative negligence statutes have generally held that the defense of express assumption of the risk survives the enactment of these statutes. V. Schwartz, *Comparative Negligence* § 9.2, at 159 (1974 & Supp. 1981). *See, e.g., Keegan v. Anchor Inns, Inc.*, 606 F.2d 35 (3d Cir. 1979); *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *Thompson v. Weaver*, 277 Or. 299, 560 P.2d 620 (1977); *Polsky v. Levine*, 73 Wis. 2d 547, 243 N.W.2d 503 (1976). Even jurisdictions whose comparative negligence statutes expressly incorporate assumption of the risk have upheld express assumption of risk. *Becker v. Beaverton Sch. Dist. 48*, 25 Or. App. 879, 551 P.2d 498 (1976); *Wilson v. Gordon*, 354 A.2d 398 (Me. 1976) (dicta). *But see Lamphear v. State*, 91 A.D.2d 791, 458 N.Y.S.2d 71 (1982).

Former RCW 4.22.010 does not expressly state it abolishes the assumption of risk doctrine; it only mentions "contributory negligence". Express assumption of the risk, however, is not "negligence". It is merely a form of waiver or consent. W. Keeton § 68, at 496. *Keegan v. Anchor Inns, Inc., supra.* We hold the doctrine of express assumption of risk survived the enactment of the comparative negligence statute, RCW 4.22.010, and is applicable in Washington. *See Lyons v. Redding Constr. Co.*, 83 Wn.2d 86, 95, 515 P.2d 821 (1973).

The doctrine, assumption of risk, will, in the Prosser [W.

> Prosser, *Torts* § 68 (4th ed. 1971)] idiom, have retained validity where there is an *express* agreement to assume, *or* the plaintiff has assumed a risk with knowledge of willful, wanton, or reckless negligence of the defendant.

(Italics in original omitted. Italics ours.) *Lyons*, at 95. *See Klein v. R.D. Werner Co.*, 98 Wn.2d 316, 319, 654 P.2d 94 (1982). *See also* V. Schwartz, *supra*; W. Keeton § 68, at 496.

[3] The next question is whether the Shorters could be found by the jury to have expressly assumed the risk that Dr. Drury's performance of the D and C could be negligent, thereby increasing Mrs. Shorter's chances of bleeding to death. For a person expressly to assume the risk of another's conduct, that person must have knowledge of the risk, appreciate and understand its nature, and voluntarily choose to incur it. W. Keeton § 68, at 486–87; *Martin v. Kidwiler*, 71 Wn.2d 47, 49, 426 P.2d 489 (1967). The test is a subjective one: Whether the plaintiff in fact understood the risk; not whether the reasonable person of ordinary prudence would comprehend the risk. *Martin v. Kidwiler*, *supra*. We find the record contains sufficient evidence from which a jury could have concluded the Shorters understood and expressly assumed the risk of bleeding to death as a result of Dr. Drury's negligence.

The general rule is that for persons to assume a risk, they must be aware of more than just the generalized risk of their activities; there must be proof they knew of and appreciated the specific hazard which caused the injury. *See Runnings v. Ford Motor Co.*, 461 F.2d 1145, 1148 (9th Cir. 1972); *Garcia v. South Tucson*, 131 Ariz. 315, 640 P.2d 1117 (Ct. App. 1981). From this rule, plaintiff argues that while he and his wife were aware of the generalized risk of bleeding to death, they did not understand Mrs. Shorter's chances of bleeding to death would be greatly increased by Dr. Drury's negligence. The Shorters, however, did not merely assume a "generalized risk". They assumed the specific risk that Mrs. Shorter might die from bleeding if she refused to permit a blood transfusion. *See Simpson v. May*, 5 Wn. App. 214, 486 P.2d 336 (1971).

The Shorters signed the refusal which stated that they waived professional liability for "unfavorable reactions" or "untoward results" due to Mrs. Shorter's refusal to permit the use of blood. Mrs. Shorter consulted with Drs. Drury and Ott, both of whom advised her that the D and C, even if nonnegligently performed, could result in fatal bleeding. Furthermore, the Shorters were repeatedly advised Mrs. Shorter was bleeding and that without a transfusion her death was imminent.

[4] Plaintiff calls our attention to the common law principle that a person cannot assume the risk of another's negligence. *See, e.g., Regan v. Seattle*, 76 Wn.2d 501, 458 P.2d 12 (1969) (driver of "go–cart" on race course does not assume extraordinary risk that there may be spilled water on the course); *Wood v. Postelthwaite*, 6 Wn. App. 885, 496 P.2d 988 (1972) (golfer does not assume extraordinary, unforeseen risk of being hit by golf ball due to inadequate warning but may assume other risks inherent in the game), *aff'd*, 82 Wn.2d 387, 510 P.2d 1109 (1973). While we do not question the rule, we disagree with plaintiff's assertion that it applies in this case.

The defendants do not argue, nor do we hold, that the Shorters assumed the risk of the "direct consequences" of Dr. Drury's negligence. Those "consequences" would be recoverable in a survival action under RCW 4.20.046, .050, and .060. Defendant argues, however, and we agree, that the Shorters could be found by the jury to have assumed the risk of death from an operation which had to be performed without blood transfusions and where blood could not be administered under any circumstances including where the doctor made what would otherwise have been correctable surgical mistake. The risk of death from a failure to receive a transfusion to which the Shorters exposed themselves was created by, and must be allocated to, the Shorters themselves.

The case of *Mainfort v. Giannestras*, 49 Ohio Op. 440, 111 N.E.2d 692 (C.P. 1951) is on point. In *Mainfort*, the plaintiff, a diabetic, consulted with the defendant doctor

regarding an operation to lengthen his leg. The doctor explained the operation was particularly risky, due to the possibility that a bone infection might result from the diabetes. The doctor alleged he advised the plaintiff the operation was risky, for the above reasons, "notwithstanding that said treatment and operation would be done in strict and full accord with approved and proper medical methods and practices . . .". *Mainfort*, at 441. The plaintiff nevertheless consented. The doctor performed the operation negligently and the plaintiff's diabetic condition aggravated the doctor's negligence. Although it acknowledged that plaintiff did not assume the risk of the negligently performed operation, the court upheld the assumption of risk defense to the extent it barred negligence damages accruing to the plaintiff's diabetic conditions. The court held:

> [The assumption of risk defense] is strictly confined to the consequences growing out of the diabetic condition, which condition, and the risks it attached to the operation, is alleged to have been fully made known to the plaintiff by the defendant before the plaintiff consented to the operation.

Mainfort, at 442.

Mr. and Mrs. Shorter did not assume the risk of the negligence. The risk they did assume was the risk of death as the consequence of their refusal to permit a blood transfusion.

III

[5] Finally, plaintiff asserts the submission of the issue of assumption of the risk to the jury violated the free exercise clause of the First Amendment. Plaintiff concedes he has found no cases involving the effect of a patient's refusal of blood in a malpractice action. Nevertheless, plaintiff claims error in the refusal of the trial court to give his proposed instruction 24 which would have told the jury compensation could not be denied because of a refusal of blood for religious reasons. While the Supreme Court has stated the free exercise clause of the First Amendment forbids the "state condition[ing] receipt of an important benefit upon

conduct proscribed by a religious faith . . .", *Thomas v. Review Bd.*, 450 U.S. 707, 717, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981), a prerequisite for First Amendment cases is that there be some state action or interference. *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963); *Thomas v. Review Bd., supra*. There is none here. This is a dispute between private individuals; plaintiff is denied no rights under the First Amendment.

To summarize: The refusal was properly placed before the jury; the instructions on assumption of the risk were not in error and the issue was properly before the jury; there was no violation of the free exercise clause of the First Amendment.

Affirmed.

WILLIAMS, C.J., DIMMICK and ANDERSEN, JJ., and CUNNINGHAM, J. Pro Tem., concur.

PEARSON, J. (dissenting)—The majority holds the Shorters did not assume the risk of Dr. Drury's negligence. I fully agree. The refusal form did not specifically state that Dr. Drury was released from damages resulting from his negligence, nor is there evidence the Shorters were specifically aware of the precise nature and extent of possible injury. *See* Restatement (Second) of Torts § 496B, comments *b*, *d* (1965); *Colton v. New York Hosp.*, 98 Misc. 2d 957, 414 N.Y.S.2d 866 (1979); *Martin v. Kidwiler*, 71 Wn.2d 47, 426 P.2d 489 (1967).

The majority further holds the Shorters assumed the risk of death at the point where Dr. Drury's negligence created a life–threatening situation; that holding is tantamount to a holding that the Shorters assumed the risk of Dr. Drury's negligence. Thus, the majority seeks to accomplish its desired result through an analysis that attempts to mask its real effect: substantially excusing the doctor from liability for his negligence. I do not agree with this analysis or result. I therefore dissent.

The majority's holding necessarily decides the Shorters assumed the risk of death from refusal to take blood, *no matter how the necessity for blood arose.* I would agree that if the necessity for blood resulted from the nonnegligent performance of the procedure, the Shorters assumed the risk of death resulting from their refusal to take blood. *See Colton v. New York Hosp., supra.* But, if the need for blood arose from the doctor's negligence, the majority would hold the Shorters still assumed the risk of death resulting from their refusal to take blood. Unlike the majority, I see a significant difference between the two scenarios.

The risk of excessive bleeding inherent in the nonnegligent performance of the procedure was increased by the Shorters' refusal to take blood; that is a risk properly allocated to the Shorters. The refusal form signed by the Shorters represents their assent to relieve Dr. Drury of his duty to administer blood if required by the nonnegligent performance of the procedure. Mr. Shorter testified that such was his understanding at the time the procedure was performed. If Dr. Drury had performed the operation without negligence, but Mrs. Shorter had bled to death anyway, the doctor could not be held liable in this case.

However, the *additional* risk of bleeding to death created by the doctor's negligence is not a risk that should be allocated to the Shorters. If the Shorters are held to have assumed the risk of death from refusing blood, even when the blood was required because the doctor was negligent, that is in effect holding that the Shorters assumed the risk of the doctor's negligence. To expressly assume the risk of another's conduct, one must have knowledge of the risk, appreciate and understand its nature, and voluntarily choose to incur it. W. Keeton, *Torts* § 68, at 486–87 (5th ed. 1984); *Martin v. Kidwiler, supra* at 49. Express assumption of a risk requires assent to both the specific *type* and the *magnitude* of the risk. 57 Am. Jur. 2d *Negligence* § 281, at 674 (1971). Additionally, a person does not have the duty to foresee negligence when he voluntarily exposes himself to a

known risk. *See Jones v. Wittenberg Univ.*, 534 F.2d 1203 (6th Cir. 1976).

Traditional tort analysis forecloses the result reached by the majority because the evidence in this case is insufficient to support a finding of assumption of risk by the Shorters. Dr. Drury's negligence greatly increased Mrs. Shorter's chances of bleeding to death; thus, the "magnitude" of the risk was increased. The record clearly reflects the fact that the Shorters believed the procedure was routine. The dangers of performing the D and C were never fully explained to the Shorters; they were not informed that three methods of accomplishing the procedure were available, nor were they told that the method Dr. Drury planned to use was the method most likely to result in uterine perforation and excessive bleeding. The Shorters were merely informed of a generalized risk of bleeding inherent in the procedure. Awareness of a generalized risk is not sufficient to prove an express assumption of risk; there must be proof that a person knew and appreciated the *specific hazard* that caused the injury. *See Runnings v. Ford Motor Co.*, 461 F.2d 1145, 1148 (9th Cir. 1972); *Martin v. Kidwiler, supra; Klein v. R.D. Werner Co.*, 98 Wn.2d 316, 654 P.2d 94 (1982).

The majority concedes the Shorters did not expressly assume the risk of the doctor's negligence. Having decided that, it logically follows that the Shorters did not expressly assume the risk of bleeding to death as a result of refusing blood, where the need for such blood resulted from the doctor's negligence rather than from the risks inherent in the procedure itself.

Accordingly, we come full circle: the Shorters did not assume the risk of negligence; they similarly did not assume the risk that a refusal of blood, which was *necessitated by that negligence*, would cause death. Only through the most strained analysis can the majority find that the Shorters assumed *any* risk here, beyond those risks inherent in a nonnegligently performed procedure.

Thus, the jury could not have found that the Shorters assumed the risk of death under the facts here. I would

hold it was error to submit the assumption of risk question to the jury. Accordingly, I would strike the finding that the Shorters assumed the risk of 75 percent of their injury and reinstate the full $412,000 verdict to Mr. Shorter. *See Klein v. R.D. Werner Co., supra* at 320.

UTTER, BRACHTENBACH, and DORE, JJ., concur with PEARSON, J.

THE SUPREME COURT OF WASHINGTON

ELMER E. SHORTER,
as Personal
Representative,

Appellant,

vs.

ROBERT E. DRURY,
ET AL [sic],

Respondents.

No. 50601-9

ORDER DENYING

MOTIONS FOR

RECONSIDERATION

The Court having considered the appellant's motion for reconsideration and motion to take additional evidence and there being no majority for granting or denying the motions,

It is ordered that no reconsideration will occur and no additional evidence will be taken.

Dated this /s/ 25th day of March, 1985.

/s/ Dolliver
Chief Justice

GENERAL HOSPITAL OF EVERETT

REFUSAL TO PERMIT BLOOD TRANSFUSION

Date /s/ 11/30/79 Hour /s/ 6:15 a.m.

I request that no blood or blood derivatives be administered to /s/ Doreen V. Shorter during this hospitalization. I hereby release the hospital, its personnel, and the attending physician from any responsibility whatever for unfavorable reactions or any untoward results due to my refusal to permit the use of blood or its derivatives and I fully understand the possible consequences of such refusal on my part.

/s/ Doreen V. Shorter
Patient

/s/ Elmer Shorter
Patient's Husband or Wife

When Patient is a minor or incompetent to give consent:

/s/ Husband
Relationship

Witness: /s/ Denise E. Butler

GHE # 635 (revised 4-65)

PETITIONER'S PROPOSED JURY INSTRUCTION NO. 24:

You are instructed that every person has a right, which is protected under the United States Constitution to refuse medical treatment, or various forms of medical treatment, whether the exercise of such right is based upon religious conviction.

The exercise of this right includes the right to refuse to accept blood, where such refusal is based upon the patient's religious convictions.

Therefore, if you find that Doreen Shorter and her husband refused the acceptance of blood or blood products, and if you further find that such refusal was based upon their religious convictions, compensation should not be denied because of such refusal if you would otherwise find in favor of the Plaintiffs under the instructions as given by the court in this case.

PETITIONER'S EXCEPTIONS TO JURY INSTRUCTIONS

The following is an excerpt, pursuant to Supreme Court Rule 21.1(h), showing that the federal question was timely and properly raised so as to give this Court jurisdiction to review the state court judgment on writ of certiorari.

Petitioner's counsel timely took due exception to the trial judge's refusal to submit petitioner's proposed Instruction No. 24 (App. 26a) to the jury, and to the trial judge's submission of instructions (App. 38a-44a) pertaining to the assumption of risk by the Shorters for refusing a blood transfusion after respondent's negligence, as being violative of the First Amendment, recorded at RP 745:22-746:24, as follows:

[By petitioner's counsel]: Instruction number 24, plaintiff's proposed instruction number 24, plaintiff excepts to the Court's refusal to give that instruction. This is the one, of course, where the jury is instructed that a person has a right protected under the United States Constitution to pursue their own religious beliefs which includes, of course, the right to refuse to accept blood or any other medical treatment, for that matter, and that compensation should not be denied because of the exercise of that right.

Your Honor, I have set forth the authorities which support that position, and as I think I argued, there's been so many arguments in this case and I can't recall now whether it was before Judge Rutter or up here, but I've argued that, and I still argue that this is a right protected by the United States Constitution, and to submit this argument to the jury permits them as an arm of the State to pass upon the validity of the person's religion or religious convictions. And I'll have to say, Your Honor, that I make the same argument with respect to all of the Court's instructions with respect to assumption of risk or refusal to accept blood. I hope it isn't necessary to go back and get all the records out, but I want to get the record as clear as possible, but I omitted saying

that and I think the same argument applies in each of those cases. We're getting into State action because of the jury's deliberation in this case and they are going to pass upon the validity of a religion, and that's a violation of the Constitution.

Testimony of Respondent Dr. Drury On Cross Examination By Respondent's Attorney, Unless Otherwise Indicated, Recorded at RP 168:11 - 172:18.

A: Mr. Shorter called me in the afternoon [of November 23rd] . . . and he was naturally concerned about his wife . . . He asked me, "What's the condition? What's going on?" And I explained to him . . . over the phone that there was a good possibility that the pregnancy is lost . . . but that I wanted to be absolutely sure of that, . . . I said . . . "We've probably waited a long enough time and if it hadn't come out by itself, we should go ahead and proceed with a D and C", and I explained to him what a D and C was, it was evacuating the uterus with the scraping, the curettage, ...

I did tell him also that there were risks the D and C for bleeding and perforation. On the other hand, I said, "Just doing nothing provides a risk also of spontaneous bleeding because of the coagulation factors changing." I said, "If you wait a real long time that could happen", and so that the lesser of the two risks would be the D and C, . . . and I think that was about the end of our conversation.

Q: This was a telephone conversation on the 23rd of November?

A: That's correct.

. . . .

Q: When did you next see Mrs. Shorter?

A: On the 29th, . . . the day prior to surgery.

Q: All right, and what occurred on the 29th?

A: I reviewed with her the whole sort of situation . . . of the last month or two and again reviewed with her . . . that she had a negative pregnancy test . . . and explained to her again that the . . . alternative that you could do nothing and wait for a long period of time and it may finally come out on its own. However, in the waiting time it could get infected or you might start to spontaneously hemorrhage, so I recommended that the alternative treatment of a D and C . . . to evacuate the uterus, and to get everything

back to normal would be better. I explained to her that, on the other hand, that there was a risk of bleeding and injury to the womb, as in any surgery, and she understood those risks.

. . . .

Q: Now, on the 29th of November, did you have occasion to talk to Mr. Shorter?

A: Yes, I did.

Q: [W]hat [did] that conversation consist of?

A: Again, Mr. Shorter called by phone, again, and I never met him personally, and asked me again what the situation was. I reviewed with him the fact that . . . I felt confident that we were not interrupting a normal pregnancy. I explained to him that we've waited a reasonable amount of time and the womb . . . had not expelled the miscarriage on its own, and we could wait indefinitely but the risks of that were bleeding and infection and I thought that the lesser risk would be to go ahead with surgery, a D and C to remove the contents. At the same time I told him that there was a risk of an injury, perforation of the uterus or bleeding. I think that Mr. Shorter asked me specifically, "Is this a serious condition", and I said yes, you know, "It's serious". I said, "I've done D and Ds [sic] before", and you know, gave him that sort of reassurance, but he was well aware that there could be a risk of injury of bleeding.

[PETITIONER'S ATTORNEY]: Your Honor, I think I'll object to the witness's statement as to what he was well aware of. He can say what he told him.

[THE COURT]: Sustained.

Testimony Of Petitioner Elmer Shorter On Direct Examination By Petitioner's Attorney, Unless Otherwise Indicated, Recorded at RP 413:23-416:9

Q: Elmer, after you and Doreen had been informed by the defendant, Dr. Drury, that the baby was dead, did Dr. Drury tell you what he planned to do in the way of treatment for that condition?

A: He told her first. She told me.

Q: . . . What did she tell you concerning what he had told her that he was going to do?

A: That the baby was dead and that he would have to do a D & C to remove . . . what was in there . . . that didn't come out, and that the process would be safe. There is no danger. However, she was concerned so she wanted me to speak to him.

Q: Did you speak to him then?

A: Yeah. I called him and he proceeded to express to me that it was what he was planning to do, and he expressed — I tried to inquire of him about her safety. He said there was no danger to her, and he explained that — this was the way he explained it, and this is what I gathered specifically from his explanation, that it was a routine procedure and that he had performed many of these with good results.

Q: Did he say anything at all about possible risks involved?

A: No, he did not . . . [S]ee, she figured that I understood technical things more than she did so she wanted me to talk to him and he — from what he had said, I wouldn't have any concern, but I pressed him for her benefit, and he continued to show that the procedure would be safe. He had performed many of these with good results, and actually there was no danger to her. So in pressing him, he told me that there was a remote possibility, and this is after my pressing — is there any real chance of real danger, remote possibility of bleeding, but the chance were negligible, in such, not worth worrying about.

. . . .

Q: In your conversatin [sic] with Dr. Drury did he ever say anything about any other form of treatment other than this D & C which he planned?

A: He never mentioned any alternatives to me, and that didn't seem out of order because this was going to be a routine procedure, the normal way to go, the logical way to proceed according to what he had told me.

Q: Did he ever say anything in your conversations with him — did he say anything about any increased risks due to Doreen's faith or refusal to accept blood?

A: It never came up.

Cross Examination Of Petitioner Elmer Shorter By Respondent's Attorney, Unless Otherwise Indicated, Recorded At RP 524:11-525:6:

Q: . . . And as I recall your earlier testimony, he did advise you that there was a risk of bleeding but you recall that he said it was remote risk; is that correct?

A: I didn't say that he advised me that there was a risk of bleeding. The gist of my calling him was to confirm the situation because my wife thought that he was a very casual bit as if there was no problem, but she wanted me to confirm . . . the situation. In talking to him, I — when I said "no problem," I mean there wasn't any danger, you see. So when talking to him I got the same picture. And I understood it and it would have been — I would have probably rested it there but in order to allay her fears I kept questioning him, you know, just, "Is there any danger?" You know, and after pushing him, and he did admit that there was a remote chance, you know, but it was — it wasn't worth because it was so remote —

Q: I see. So it's your testimony that only after repeated and very close questioning by you that Dr. Drury said that there was a remote risk of bleeding?

A: Yes, and he did not speak of any undue danger. And also, this was not because I was in doubt. This was just to satisfy my wife.

Redirect Examination Of Petitioner Elmer Shorter By Petitioner's Attorney, Unless Otherwise Indicated, Recorded At RP 538:3-539:3:

Q: Did you eventually gain confidence in Dr. Drury?

A: Yes, sir.

Q: At what point did that occur? When did that happen?

A: As things progressed and inspite of my reservations I noticed that he seemed to have a regard for the life of the fetus . . . .

Another point was that in the procedure that would be involved, especially near to the end, I was assured that it was — there would be no risks involved, or negligible risks, so I figured under those circumstances my reservations wouldn't be that important . . . And also that it wasn't going to be a major procedure, like for example, if somebody was going to be cutting my fingernails . . . one person said that they were going to use a clipper whereas the other one would use a pair of shears, . . . I wouldn't have to do so much reconsidering about that because there wasn't any danger involved. . . . Up to the point when she went into have this procedure, I didn't have any expectation or any consideration that there was going to be any problem or expecting any danger whatsoever.

Testimony Of Dr. Alan E. Ott On Direct Examination by Petitioner's Attorney, Unless Otherwise Indicated, Recorded At RP 188-5:13-188-7:5

Q: Now, she indicated to you that she was a Jehovah's Witness on that occasion?

A: That's right.

Q: And would not accept blood?

A: That's right.

. . . .

Q: All right. Now, you stated that you advised her that a D and C would be the proper treatment, is that right?

A: Yes.

Q: In giving her that advice, did you distinguish between a D and C performed with a sharp curette and a D and C performed with suction curettage?

A: I don't believe I differentiated between those different methods.

Q: You just told her D and C would be proper?

A: Yes.

Q: And did you give her any advice concerning having her blood tested for any reason?

A: I believe I did. I — I'm not sure whether I mentioned this to her, but that was one of the concerns that I had, and I did tell her that she could certainly bleed during the procedure, and she was well aware of that possibility.

Q: But, in any event, whether you communicated to her or not, you were concened about testing of the blood, is that right?

[RESPONDENT'S ATTORNEY]: I'm going to object to these leading questions, Your Honor. After all, the doctor is counsel's own witness.

[THE COURT]: I'll sustain the objection in the context in which it's asked.

. . . .

Q: You indicated some concern about testing. Why is that, doctor?

A: Well, patients who have an inter-uterine fetal demise can develop a condition whether their blood would not clot, and I felt that this should be tested ahead of time, and that's — especially in light of the fact that the patient wouldn't accept blood, to make sure that her blood indeed would clot at the time of the procedure.

Continued Direct Examination of Dr. Alan E. Ott, Recorded at RP 188-11:12-188-12:10:

Q: Did she indicate whether she had been told anything concerning risks involved in a D and C?

A: I didn't ask her those questions and I don't believe she mentioned anything about it.

. . . .

Q: Did you say anything to her concerning risks involved in the fact that she would not accept blood?

. . . .

A: Well, as she was leaving, I mentioned the fact that any kind of an operation people can certainly bleed, that the fact that she wouldn't accept blood might be dangerous to her if she indeed started to bleed during this procedure, having no idea that, of course, that was going to happen and then she said that she understood this but that — something to the effect that she had faith in the Lord and that things would work out and that she really wasn't worried about that.

Q: When she responded saying that she knew this, did she indicate the source of that information?

A: No, but I — I assumed that it was common knowledge that with any operation you can certainly bleed.

Cross Examination of Dr. Alan E. Ott by Respondent's Attorney, Recorded at RP 188-24:10-188-26:25:

Q: Now, would you go ahead, Doctor, and read your chart entry in the Everett Clinic chart for the November 29, 1979 visit and examination?

A: [synopsis of examination and diagnosis of condition was read].

Q: All right. Now, that report was . . . dictated on the 29th of November, 1979, is that correct?

A: That's right.

Q: And below the typewritten part of your charter, are there four lines that are handwritten?

A: Yes. At the operation I reviewed my note and added an addendum. Should I read that?

Q: Yes, why don't you?

A: To further describe what had gone on in the office, as she was leaving I wrote: "This patient was warned that disseminated intravascular coagulopathy might occur and that her being a Jehovah's Witness would make the procedure more risky. She was aware of this. She merely wanted me to confirm that the diagnosis was correct and that proposed treatment was reasonable."

. . . .

Q: Now, when Mrs. Shorter was in your office on November 29th, did you tell her specifically that there was a risk of bleeding associated with the proposed treatment?

A: Yes. This was after she left the exam room. I can remember that she was in the hall and I mentioned this to her that certainly she could bleed and this was a risky situation for her.

Q: Did you tell her on November 29 that associated with the risk of bleeding there was a chance that she might die?

A: Yes, I told her that she could bleed and this could be serious, and that she could even bleed to death, and she said she was aware of that but that she had, as I say, she had faith in the Lord and that she wasn't too worried about it.

Continued Cross Examination of Dr. Alan Ott, Recorded at RP 188-31:5-188-31:11:

Q: Now, after the hysterectomy was completed, did you again speak to Mr. Shorter regarding a blood transfusion for his wife?

A: Yes. This time she was in very bad shape and we weren't sure at that time whether it would help her or not actually, she was in such bad shape, but we again tried to get permission to transfuse her as a last ditch effort.

Redirect Examination of Dr. Alan E. Ott, Recorded at RP 188-37:24-188-40:9:

Q: . . . When did you say that you had written in that entry that's in handwriting there, in your handwriting?

A: That must have been on the 30th because the — because the line under that is my nurse's handwriting which states that that was dated the 30th and lists the surgery that was done, so I imagine it was the day of the surgery.

Q: That would have been before or after the surgery?

A: That was after the surgery.

Q: All right, and what was your purpose in making that entry?

A: Well, that was to put down for the record what we discussed that was not a part of the — my dictated note.

. . . .

Q: And can you read again that part where you're describing what you told her concerning the risks?

A: Yes. "Patient was warned that disseminated intravascular coagulopathy might occur and that her being a Jehovah's Witness would make the procedure more risky. She was aware of this. She mainly wanted me to confirm that the diagnosis was correct and the proposed treatment was reasonable."

. . . .

Q: Doctor, you indicated in your testimony in response to [respondent's attorney's] questions that you told Doreen Shorter she might die. Does that appear in either the written note or the consultation note anywhere?

A: No, it doesn't.

TRIAL COURT'S JURY INSTRUCTION NO. 5

The plaintiff claims that the defendant was negligent in one or more of the following respects:

(1) In failing to exercise that degree of surgical skill expected of a reasonably prudent physician acting in the same or similar circumstances;

(2) In failing to refer his patient to or consult with a specialist in obstetrics and gynecology;

(3) In failing to conform to the appropriate standard of care of a reasonably prudent physician by choosing the wrong method of treatment, when other methods existed which would entail less risk of injury;

(4) In treating Doreen Shorter without obtaining her informed consent.

The plaintiff claims that one or more of these acts and omissions on the part of the defendant was a proximate cause of the injuries to Doreen Shorter and her ensuing death and the resulting damage to plaintiffs.

The defendant denies these claims.

Further, defendant claims that plaintiffs voluntarily assumed the risk of Doreen Shorter's death by their refusal to accept transfusions of blood or blood products before and after surgery.

The foregoing is merely a summary of the claims of the parties. You are not to take the same as proof of the matters claimed, and you are to consider only those matters which are established by the evidence. These claims have been outlined solely to aid you in understanding the issues. [Emphasis added.]

TRIAL COURT'S JURY INSTRUCTION NO. 6

The plaintiff has the burden of proving each of the following propositions:

First that injury resulted from negligence of the defendant in failing to comply with the standard of practice, or that injury resulted from the health care to which the patient did not give an informed consent;

Second, that Doreen Shorter was injured;

Third, that the negligence of the defendant was a proximate cause of injury to Doreen Shorter and of her death.

The defendant has the burden of proving each of the following propositions:

First, that Doreen and/or Elmer Shorter did voluntarily refuse to permit a transfusion of blood or blood products to Doreen Shorter, fully understanding the risks thereof.

Second, that such refusal was a proximate cause of Doreen Shorter's death.

Third, the degree that such conduct of plaintiffs contributed to that death.

[Emphasis added.]

TRIAL COURT'S JURY INSTRUCTION NO. 13

Assumption of the risk is conduct on the part of a person claiming injury or damage which is a proximate cause of the injury or damage complained of.

If you find that Mr. or Mrs. Shorter assumed a risk which was a proximate cause of Mrs. Shorter's death, you must determine the degree of such conduct, expressed as a percentage, attributable to Mr. and Mrs. Shorter. The Court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the Court may reduce the amount of any damages you find to have been sustained by them if you find they assumed the risk. Using 100% as the total combined conduct of the parties (negligence and assumption of the risk) which contributed to the damage to the plaintiff, you must determine what percentage of such conduct is attributable to Mr. and Mrs. Shorter

TRIAL COURT'S JURY INSTRUCTION NO. 13A

A person who fully understands a risk of harm to himself or a member of his family and who voluntarily submits to such risk under circumstances which manifest his willingness to assume the risk is not entitled to recover for harm within that risk.

In this case Mr. and Mrs. Shorter did not voluntarily assume the risk of negligence by defendant, but did voluntarily assume the risks relating to the refusal of transfusions of blood or blood products.

TRIAL COURT'S JURY INSTRUCTION NO. 14

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If you find that defendant was negligent, that such negligence was the proximate cause of Doreen Shorter's death, *and that such death was not wholly attributable to plaintiff's assumption of the risk thereof,* then you must determine:

(1) The amount of money which will reasonably and fairly compensate the widower and children of the decedent for any pecuniary loss to them which you find was proximately caused from the death of the decedent.

(2) The amount of money which will reasonably and fairly compensate the Estate of Doreen Shorter for such damages as you find were proximately caused by her death and in this connection you should consider the following elements:

(a) The nature and extent of the injuries sustained by Doreen Shorter;

(b) The reasonable value of the net prospective earnings and accumulations of Doreen Shorter, reduced to present value.

In this connection you should consider the decedent's age, health, life expectancy, occupation and habits of industry, sobriety and thrift. You should also consider the decedent's earning capacity and in this connection you should consider the actual earnings prior to death, and what earnings might reasonably been expected in the future.

The burden of proving damages rests upon the plaintiff and it is for you to determine whether any pecuniary loss has been proved by a preponderance of the evidence. Your award must be based upon evidence and not upon speculation, guess or conjecture.

[Emphasis added.]

TRIAL COURT'S JURY INSTRUCTION NO. 27

That defendant has alleged as a defense that the plaintiff voluntarily assumed the risk of injury from the care and treatment rendered by the defendant.

You are instructed that in order to establish the defense of assumption of risk you must find by a preponderance of the evidence that:

1. The plaintiff knew of, realized, and appreciated the danger of risk that the defendant would fail to possess and exercise that degree of skill, care, and learning expected of the average reasonably prudent physician acting under similar circumstances; and

2. That she voluntarily consented to expose herself to such danger and risk.

Unless you find from the preponderance of the evidence that Doreen Shorter both knew of and voluntarily consented to such danger or risk of the defendant's failure to perform according to the standard of care, this defense must fail.

March 18, 1985

TO: Attending Staff
Administrative Staff
Nursing Staff

FROM: Samuel Hellman, M.D.
Physician-in-Chief

RE: **Use of Consent Forms for Jehovah's Witnesses**

At its November 1984 meeting, the Medical Board decided to discontinue the use of the special Jehovah's Witness consent form (see attached). Effective immediately, attending physicians must inform Jehovah's Witnesses requesting treatment at this institution that, if in the course of their therapy the administration of blood or blood products is indicated, such products will not be withheld if in good medical judgment they are necessary. With this understanding, Jehovah's Witnesses will be asked to sign the standard hospital consent forms without amendment.

It is important that you communicate this policy to all Jehovah's Witnesses, and any other patients with similar beliefs, before accepting them for treatment. Patient representatives are available to assist you if necessary (extension 7202).

All Jehovah's Witnesses consent forms should be removed immediately from the nursing stations.

Memorial Sloan-Kettering Cancer Center
1275 York Avenue, New York, New York 10021

MEMORIAL HOSPITAL

REFUSAL TO PERMIT BLOOD TRANSFUSION

Date _____ 19____

Time _____ a.m.
p.m.

I request that no blood or blood derivatives be administered to_____during this hospitalization. I hereby release Memorial Hospital, its personnel, and the attending physician from any responsibility whatever for unfavorable reactions or any untoward results due to my refusal to permit the use of blood or its derivatives, and I fully understand the possible consequences of such refusal on my part.

Signature of patient: _____

Signature of patient's husband or wife: _____

When patient is a minor or incompetent to give consent, signature of person authorized to consent for patient: _____

_____
(Relationship to patient)

Witness:_____

_____

[Attachment to Office Memorandum dated March 18, 1985, of Memorial Sloan-Kettering Cancer Center:]

No. 50601-9

SUPREME COURT OF THE STATE OF WASHINGTON

ELMER SHORTER as Personal Representative of the Estate of DOREEN V. SHORTER, Deceased,	)	
Appellants,	)	AFFIDAVIT OF RANDALL D. AUSTIN
v.	)	
ROBERT E. DRURY, M.D., and JANE DOE DRURY, his wife,	)	
Respondents.	)	

STATE OF WASHINGTON)
) ss.
County of Snohomish)

I, RANDALL D. AUSTIN, being first duly sworn, depose and say:

1. I presently reside, and have at all times material hereto resided, at 1116 Lombard, Everett, Washington 98201. I am competent to testify as a witness herein; am in no way a party to the above-entitled action; and I make this affidavit based on personal knowledge, in the interests of justice, and for the purpose of inclusion in Plaintiffs' Motion for Reconsideration of the Court's decision filed herein on January 11, 1985.

2. I was present at the General Hospital of Everett when Doreen V. Shorter died as a result of her operation on November 30, 1979, the subject matter of the instant case. I was unaware that a lawsuit had been filed in this matter until I read a synopsis of this Court's opinion reported in a local newspaper on or about Friday, January 11, 1985. As such, I have never informed Elmer Shorter or his attorney

of the following and I respectfully present same to the Court for consideration.

3. Because I was an Elder in the Congregation attended by Elmer and Doreen Shorter, Mr. Shorter telephoned my house from the General Hospital of Everett on November 30, 1979, and requested that my wife and I come to the hospital because of an emergency with Doreen.

4. My wife and I arrived at the hospital and located Elmer in a waiting room outside the surgery unit.

5. Shortly thereafter two doctors came out to the waiting room to advise Elmer of Doreen's condition. The doctors advised Elmer that it was their opinion she needed a blood transfusion, whereupon I asked them about using blood substitutes and plasma volume expanders. The doctors replied that such alternatives would not do any good because there had been too much blood loss by Doreen.

6. Doreen was thereafter transferred upstairs to the intensive care unit and we also went upstairs to await the outcome.

7. After a period of time Dr. Drury came to where we were waiting and informed us that Doreen had died. Elmer became very upset and really broke down. Dr. Drury remained while we attempted to comfort Elmer.

8. As all of us were eventually leaving the room, Dr. Drury walked up beside me and stated to me that he felt it was good that Elmer had stuck to his religious beliefs because a blood transfusion would not have helped Doreen. I was impressed by Dr. Drury's concern and guarded honesty during this whole time and, because I did not know the details of what had gone wrong during the first surgery, it was my distinct understanding of Dr. Drury's statement to me that the mishap during the first surgery had been so severe and so sudden that a blood transfusion simply would not have helped Doreen survive the second operation, and I appreciated Dr. Drury's honesty about that fact.

9. Until recently, I have not intimately spoken to Elmer regarding this matter because he is quite a private person by nature, although I have on several occasions spoken to

others about Doreen's death and the aforementioned conversation I had with Dr. Drury.

10. I clearly recall the day of Doreen's death and I have accurately recounted the foregoing facts, which have heretofore not been a part of the record of proceedings before this court.

/s/ Randall D. Austin

Randall D. Austin, Affiant

SUBSCRIBED AND SWORN TO before me this 26th day of January, 1985, by RANDALL D. AUSTIN, to me known to be the individual who signed the within and foregoing document and acknowledged that he signed same as his free and voluntary act, for the uses and purposes therein mentioned.

/s/ Chris Dingel

Notary Public in and for the State of Washington, residing at /s/ Everett

Office-Supreme Court, U.S.
FILED
JUL 29 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1989

IN THE

Supreme Court of the United States

October Term, 1984

ELMER SHORTER,
as Personal Representative of
the Estate of DOREEN V. SHORTER, Deceased,
Petitioner,

vs.

ROBERT E. DRURY, M.D., et ux.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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July 26, 1985

aBCD Legal Printers, Seattle, Washington

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No. 84-1989

IN THE
Supreme Court of the United States

October Term, 1984

ELMER SHORTER,
as Personal Representative of
the Estate of DOREEN V. SHORTER, Deceased,
Petitioner,

vs.

ROBERT E. DRURY, M.D., et ux.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

I. RESPONSE TO QUESTIONS PRESENTED FOR REVIEW

Respondents respectfully submit that, because it is the only purported question of federal law petitioner raised, the sole question presented for review should be:

Whether the trial court's submission of assumption of risk to the jury in a wrongful death medical malpractice action against a private defendant violated First Amendment rights under the free exercise clause where a blood transfusion was refused for religious reasons and it was undisputed that, notwithstanding defendant's alleged negligence, death would not have occurred had the transfusion been permitted.

II. STATEMENT OF THE CASE

This is a wrongful death medical malpractice action arising out of the death from bleeding of Doreen Shorter, a Jehovah's Witness, who, along with her husband, for religious reasons refused to allow a blood transfusion that, according to the undisputed evidence at trial, would have averted her death.

Dr. Drury, a family practice physician, treated Doreen Shorter's pregnancy from October 4 to November 30, 1979. (RP 639:10-15.) In November, Dr. Drury diagnosed Mrs. Shorter as having a missed abortion — a condition where the fetus dies in the womb, but does not spontaneously abort. (RP 33:2-12; 35:1-5; 38:3-6; 73:13-18.) After making sure the fetus was dead, Dr. Drury recommended a dilatation and currettage (D&C) to evacuate the fetus from the uterus. (RP 166:5-172:14.)

When a missed abortion occurs, it is medically prudent to evacuate the uterus to guard against infection and disseminated intravascular coagulapathy (DIC) — a condition where the mother's blood loses its ability to clot. (*See, e.g.*, RP 213:4-214:5.) Although one can wait a short time after fetal demise to see if the fetus will spontaneously expel, it is not advisable to wait long because of the risk of infection and DIC. (*See, e.g.*, RP 169:7-15; 170:16-171:6; 172:1-14; 188-7:15-18.)

The experts agreed that some form of evacuation of the uterus was appropriate. To achieve evacuation, there are three alternatives: (1) blunt and sharp currettage; (2) suction currettage; and (3) prostaglandin suppositories. All three methods of evacuation carry the risk of either perforation or rupture of the uterus and of bleeding. (*See, e.g.*, RP 188-18:2-189-19:12; 460:23-462:9; 492:5-493:25; 505:15-506:10; 575:16-576:3.) With each method of uterine evacuation and with mere watchful waiting, the possibility of blood loss exists.

Dr. Drury discussed his diagnosis and recommendations with both Mr. and Mrs. Shorter. (RP 166:5-172:14; 425:2-8.) He described the D&C procedure and advised of the risks of uterine perforation and bleeding with a D&C. Dr. Drury also discussed the alternative of doing nothing — watchful waiting — and the attendant risk of spontaneous bleeding due to DIC. (RP 166:8-168:1; 168:6-169:15; 170:15-171:6; 171:18-172:14.) Mr. Shorter conceded that Dr. Drury had informed him of the risk of bleeding, albeit remote, with the D&C. (RP 414:19-415:7.)

On November 29, the day before the scheduled D&C, Mrs. Shorter sought a second opinion from Dr. Allen Ott, an obstetrician, who confirmed the diagnosis of missed abortion and recommended a D&C. (RP 188-3:25-188-4:22; 188-5:23-25.) Dr. Ott told Mrs. Shorter "she could certainly bleed during the procedure" and testified that "she was well aware of that possibility." (RP 188-6:12-13.) He also told her "that [with] any kind of operation people can certainly bleed; that the fact that she wouldn't accept blood might be dangerous to her if she indeed started to bleed during this procedure." He testified that she said "she understood this but . . . she had faith in the Lord and that things would work out. . . ." (RP 188-10:19-188-12:6.)

Contrary to petitioner's assertion at page 21 of his Petition for Writ of Certiorari, Dr. Ott's warnings about the risk of blood loss were not limited to blood loss from DIC. (*See* RP 186-6:12-13; 188-10:19-188-12:6; 188-26:12-25), although Dr. Ott also warned of that risk of bleeding. (RP 188-25:20-188-26:6.) Dr. Ott clearly advised Mrs. Shorter of the risk of bleeding with the D&C and the risk that she could bleed to death if bleeding occurred and she refused a transfusion. (RP 188-26:12-25; CP 116-17.)

On November 30, Dr. Drury admitted Mrs. Shorter to the hospital for the D&C. (RP 417:6-16.) On admission, Mr. and Mrs. Shorter signed a form entitled "Refusal to Permit Blood Transfusion." (RP 529:2-530:13; 616:18-617:16; 619:13-620:3; Exhibit 9.) The form provided:

> I request that no blood or blood derivatives be administered to Doreen V. Shorter during this hospitalization. I hereby release the hospital, its personnel, and the attending physician from any responsibility whatever for unfavorable reactions or any untoward results due to my refusal to prevent the use of blood or its derivatives and I fully understand the possible consequences of such refusal on my part.

Dr. Drury performed the D&C on November 30, and Mrs. Shorter went to the recovery room at 9:15 a.m. in stable condition. (RP 689:15-690:21.) Contrary to petitioner's suggestion at pages 6-7 of his Petition, there was no indication that Mrs. Shorter was bleeding profusely at the time of or immediately after the procedure. (RP 689:15-25; 690:18-692:12; 698:4-20.) As Dr. Guildner, the anesthesiologist, testified, there were no significant changes in Mrs. Shorter's vital signs to indicate rapid hemorrhaging. (RP 698:4-20.) Mrs. Shorter was awake, responding, and talking after the surgery. (RP 690:22-691:12.) At 9:45, blood in Mrs. Shorter's urine was noted. (RP 692:3-6.) Dr. Drury was called and Dr. Cooper, a urologist, saw Mrs. Shorter. (RP 177:22-178:20; 652:5-14; 692:7-17.)

Dr. Cooper talked to Mr. Shorter and told him that "his wife would have to have a second operation, that they would probably find a hole in the bladder, in addition to probably other problems," and that "she needed blood in the worst way because [they] were unable to support her blood pressure . . . with the fluids [they] were giving her." (RP 727:20-728:2.) Mr. Shorter responded that he could not allow that. (RP 728:3-5.)

Meanwhile, Dr. Drury had called Dr. Ott and both doctors went to the hospital. (RP 188-12:11-15; 652:22-653:1.) Before they arrived, Dr. Meagher, another anesthesiologist, began administering fluids — normal saline and lactated Ringer's solution — in an attempt to expand blood volume and elevate blood pressure. (RP 702:13-18; 703:10-16; 706:10-22; 728:7-14.) Dr. Meagher explained to Mrs. Shorter that "it probably would be necessary to utilize a whole blood transfusion to save her life" and that "she was probably going to die if she didn't accept a blood transfusion." (RP 703:17-704:3.) Mrs. Shorter refused, telling Dr. Meagher that "she felt blood should not be administered to her, she had signed a legal document directing that no blood be given to her and that if God wanted her to die, then this is what would happen. If he wanted her to live, she would live." (RP 704:4-13.)

After Dr. Drury and Dr. Ott arrived, arrangements were completed for exploratory surgery. Dr. Ott spoke again with Mrs. Shorter and told her he thought "that there was a perforation of her uterus and . . . a perforation of her bladder as well," and that they "needed to take her back to surgery to stop the bleeding that was continuing or she would essentially bleed to death." (RP 188-14:2-14.) Dr. Ott tried to convince her to accept blood, but she refused. (RP 188-14:2-14.)

Before the second surgery, all of the physicians, except Dr. Guildner, discussed the urgency of the situation and the need for a transfusion with the Shorters. The imminent danger of death without a transfusion was explained, but both Mr. and Mrs. Shorter remained adamant in their refusal to permit a transfusion. (RP 180:6-181:14; 188-14:2-16; 188-28:6-16; 188-29:17-188-31:1; 526:20-528.1; 654:16-655:8; 703:10-706:4; 727:20-728:17.)

Mrs. Shorter was then taken back to the operating room where Dr. Ott, with Dr. Drury assisting, performed an exploratory laparotomy and hysterectomy and Dr. Cooper repaired the bladder perforation. (RP 188-14:17-188-15:8.) Both during and after the surgery, Mr. Shorter was advised of the urgency of his wife's condition and the need for blood. Mr. Shorter persisted in his refusal, despite repeated warnings that Mrs. Shorter would die without a transfusion. (RP 188-31:5-18; 528:2-15; 655:9-21; 708:17-709:3; 718:13-719:11.)

Eventually, Mrs. Shorter was transferred to intensive care by Dr. Spencer, a critical care specialist. (RP 717:20-718:5; 719:14-23.) He too tried to convince Mr. Shorter to permit a transfusion, but to no avail. (RP 718:13-719:11.) Mrs. Shorter died later that afternoon.

At trial, the experts called by both parties agreed that, notwithstanding Dr. Drury's claimed negligence, Mrs. Shorter would not have died had she or her husband not refused to permit a blood transfusion. (RP 188-31:19-24; 262:3-8; 329:5-9; 466:17-467:8; 578:14-17; 597:5-15; 658:8-11; 719:24-720:12; 728:18-729:6.) No evidence was introduced suggesting that a blood transfusion would *not* have saved Mrs. Shorter's life. It was undisputed at trial that death would not have followed from any of Dr. Drury's claimed negligence had the Shorters permitted a transfusion.

Contrary to petitioner's one-sided factual narrative of the evidence presented to establish Dr. Drury's negligence, there was ample evidence that Dr. Drury complied with applicable standards of care in Mrs. Shorter's treatment. (RP 188-5:23-25; 188-17:10-188-19:12; 188-25:25-188-26:11; 188-31:25-188-32:12; 188-32:25-188-33:3; 268:21-269:6; 318:20-319:1; 325:15-17; 325:25-326:12; 327:5-11; 365:9-19; 377:1-6; 454:24-457:15; 458:16-463:2; 495:6-12; 504:20-506:1; 575:7-576:3; 578:18-21; 581:3-16; 590:20-593:1; 593:17-594:17; 595:8-596:11; 706:23-708:16.)

Although Dr. Drury's claimed negligence was heavily disputed at trial, certain facts bearing on the question of the Shorters' assumption of risk were undisputed:

a. Mrs. Shorter and her husband, long before meeting Dr. Drury, had chosen to follow religious tenets of the Jehovah's Witness faith prohibiting blood transfusions; (RP 387:18-388:2; 390:2-391:15; 624:4-626:5.)

b. Before Dr. Drury performed the D&C, Mr. and Mrs. Shorter signed a "Refusal to Permit Blood Transfusion" discharging Dr. Drury from all responsibility for any untoward results from the refusal to permit a transfusion; (RP 529:20-530:13; 616:18-617:16; 619:13-620:3; Exhibit 9.)

c. Before signing that release, Mrs. Shorter knew she could bleed and she could die if she refused to permit a transfusion; (RP 188-11:19-188-12:10; 188-25:20-188-26:25; *see also* RP 629:15-632:11.)

d. After the D&C, when bleeding became apparent, the Shorters repeatedly were apprised of the gravity of the situation and the need for a transfusion to avoid imminent death, but persisted in their refusal to permit a transfusion; (RP 180:6-181:14; 188-28:6-16; 188-29:17-188-31:1; 188-31:5-18; 526:20-528:15; 655:9-21; 703:10-706:9; 706:16-22; 708:17-709:3; 718:20-719:11; 727:5-728:15.)

e. Mrs. Shorter would not have died, notwithstanding any claimed negligence by Dr. Drury, had she or her husband permitted a blood transfusion. (RP 188-31:19-24; 262:3-8; 329:5-9; 466:17-467:8; 578:14-17; 597:5-15; 658:8-11; 719:24-720:12; 728:18-729:6.)

After the close of the evidence, the trial court denied defendants' motion for directed verdict and submitted the case to the jury with instructions enabling them to determine whether the Shorters assumed the risk of death from bleeding by their refusals to permit a transfusion and to determine to what degree that assumption of risk, if any, contributed to Mrs. Shorter's death.

On October 15, 1982, the jury returned a special verdict finding that Dr. Drury was negligent, his negligence was a proximate cause of Mrs. Shorter's death, the total death damages were $412,000, the Shorters knowingly and voluntarily assumed the risk of Mrs. Shorter's death from bleeding, and their conduct contributed 75% to Mrs. Shorter's death. (Pltf CP 38-39.)

After both parties' motions for judgment notwithstanding the verdict were denied, petitioner appealed to Division I of the Washington Court of Appeals. No cross-appeal was taken from the jury's finding of Dr. Drury's negligence. The court of appeals certified the case directly to the Washington Supreme Court. In a 5-4 decision, the Washington Supreme Court affirmed the trial court in all respects. The Washington Supreme Court held that the "Refusal to Permit Blood Transfusion" the Shorters signed was properly placed before the jury, assumption of risk was a valid defense, the instructions to the jury on assumption of risk were not in error, and there was no violation of the free exercise clause of the First Amendment. The constitutional question was not discussed in the dissenting opinion.

Petitioner has petitioned this Court for a writ of certiorari. The sole federal question raised is petitioner's assertion that submission of assumption of risk to the jury violated the free exercise clause of the First Amendment.

III. REASONS FOR DENYING THE WRIT

Respondent respectfully submits that the Petition for Writ of Certiorari should be denied because the Washington Supreme Court has not decided an important question of federal law which should be settled by this Court or decided a federal question in a way in conflict with applicable decisions of this Court within the meaning of Rule 17.1(c), Rules of the Supreme Court.

The Washington Supreme Court merely decided whether the Washington common law doctrine of assumption of risk had continuing validity and applicability in a wrongful death medical malpractice action between two private parties where it was undisputed that death would not have occurred but for refusal to permit a blood transfusion. The Washington Supreme Court found that the assumption of risk doctrine had retained validity, did apply, and could operate to apportion damages for the death according to the respective degrees that defendant's negligence and the Shorters' assumption of risk contributed to the death. The Washington Supreme Court also held that there was no state action depriving plaintiff of rights under the First Amendment.

This is not a case with special and important reasons for granting certiorari. This is not a case involving principles, the settlement of which is of importance to the public, but rather is one of importance only to the parties. Indeed, no similar cases in any jurisdiction have been found raising the question of the effect of a Jehovah's Witness' refusal of blood in a medical malpractice wrongful death action. The case simply does not pose problems beyond the episodic. As this Court recognized in *Rice v Sioux City Cemetery*, 349 U.S. 70, 74, 99 L. Ed. 897, 901, 75 S. Ct. 614 (1954):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . "Special and important reasons" imply a reach to a problem beyond the academic or episodic.

This case is simply one governed by state law regarding the degree to which each private party in a wrongful death medical malpractice action must bear responsibility for death damages when it is undisputed that the death would not have occurred, despite any claimed negligence of defendant, had a blood transfusion been permitted. The mere fact that the assumption of risk by the Shorters was for religious reasons does not mean that the state court denied them First

Amendment rights by submitting the issue of assumption of risk to the jury.

This is not a case where the trial court or jury was asked to decide the validity or reasonableness of religious beliefs as in *United States v. Ballard*, 322 U.S. 78, 88 L. Ed. 1148, 64 S. Ct. 882 (1944). Nor is it a case where plaintiffs were denied a public welfare or workmen's compensation benefit, forcing plaintiffs to choose between receiving the state benefit or exercising religious beliefs, as in *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963) or *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981). Nor is it a case where the state courts sanctioned or approved private deprivations of religious freedom, for here, even Dr. Drury respected the Shorters' religious beliefs and did not administer a blood transfusion contrary to their wishes. Compare in the racial discrimination context, *Shelley v. Kraemer*, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1948) and *Barrows v. Jackson*, 346 U.S. 249, 97 L. Ed. 1586, 73 S. Ct. 1031 (1953).

Nothing in the trial court's action or the Washington Supreme Court's decision represents state interference with the Shorters' exercise of their religion. The jury's after-the-fact determination that the Shorters bore 75% responsibility for Mrs. Shorter's death in no way compelled or coerced the Shorters to forego the free exercise of their religious beliefs. Mr. and Mrs. Shorter exercised their First Amendment rights to the fullest. Dr. Drury respected their religious beliefs and did not administer a blood transfusion against their will. The jury merely determined the degree to which the Shorters, as opposed to Dr. Drury, must bear reponsibility for the death that ensued their voluntary exercise of their religious beliefs.

In essence, petitioner now seeks to have this Court hold that the First Amendment requires the state courts to order Dr. Drury to bear the entire cost of the Shorters' refusal, on religious grounds, to permit a transfusion, even though that cost — Mrs. Shorter's death — would not have occurred had the transfusion been permitted. The Shorters' First Amendment rights do not require that another private party must bear the cost of their exercise of their religious beliefs.

Contrary to petitioner's assertion in his Petition, this case does not directly involve 676,591 active Jehovah's Witnesses and 934,719 other individuals who attended the Jehovah's Witnesses' annual Memorial. Nor does petitioner's First Amendment argument impact all individuals who refuse blood transfusions for non-religious reasons. This case only directly impacts Dr. Drury and the Shorters for it is merely a dispute between these private parties over their respective responsibility for the death of Mrs. Shorter.

Furthermore, to the extent petitioner wishes to question "the extent to which a competent adult may assume the risk of bleeding to death" or the "extent to which civil liability is avoided by the release approved by the American Medical Association," this case clearly involves matters governed purely by state law. It is not the province of federal law to establish guidelines for resolving such issues or to establish a uniform policy throughout the states for dealing with transfusion releases. These are matters of state tort law and but for the fact that the Shorters refused a transfusion for religious reasons, petitioner clearly would have no basis for asserting any conceivable federal question. And, simply because the refusal of a transfusion was for religious reasons, the Washington courts did not in any way infringe upon the Shorters' First Amendment right to the free exercise of religious beliefs.

A. Submission of Assumption of Risk to the Jury Did Not Violate Plaintiff's Constitutional Rights.

Petitioner urges that the Washington Supreme Court erred in holding that submission of assumption of risk to the jury did not violate the free exercise clause of the First Amendment. The free exercise clause of the First Amendment, as applied to the states through the Fourteenth Amendment, however, proscribes only state action which has a coercive effect on an individual's practice of his religion. *See, e.g., Board of Education v. Allen*, 392 U.S. 236, 20 L. Ed. 2d 1060, 88 S. Ct. 1923 (1968); *Abington School District v. Schempp*, 374 U.S. 203, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963). Here, the Washington courts denied plaintiff no rights under the First Amendment.

Indeed, the only free exercise clause case petitioner cites in support of his First Amendment claim is *Thomas v. Review Board*, 450 U.S. 707, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981), where this Court stated at 450 U.S. 717-18:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

But, *Thomas* involved the state's denial of unemployment compensation benefits to a Jehovah's Witness who terminated his job because his religious beliefs forbade participation in the production of armaments. This Court, following *Everson v. Board of Education*, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504 (1947) and *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 968, 83 S. Ct. 1790 (1963), found that the state's denial of that public benefit put Thomas "to a choice between fidelity to religious belief or cessation of work" and, therefore, the coercive impact on his exercise of religious belief was clear.

This case is distinguishable from *Thomas*, however, because it does not involve denial of any public benefit forcing plaintiff to choose between the public benefit or the exercise of religious beliefs. Here, no public benefit was involved and no state action compelled or coerced the Shorters to forego the exercise of religious beliefs.

Instead, this case deals solely with the allocation of liability between two private parties. The Shorters were free to accept the tenets of their faith, believe in them and exercise their right to practice those beliefs. But, the right to free exercise of religion did not give them the right to impose liability on another private party for death resulting from the voluntary practice of religion.

The major thrust of the petitioner's First Amendment argument appears to be directed at the Washington Supreme Court's conclusion that no state action was present in this case. Petitioner, having cited only one case — *Thomas, supra* — in support of the proposition that plaintiff's rights under the free exercise clause of the First Amendment were violated, cites several cases — *Shelley v. Kraemer, supra, Barrows v. Jackson, supra,* and *New York Times v. Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) — in support of his proposition that the actions of the Washington courts and jury constituted state action.

But, those cases are distinguishable and do not support the proposition that there was sufficient state action denying the Shorters' constitutional rights in this case. Unlike *Shelley, Barrows,* and *New York Times,* no coercive power of the state judiciary was exercised here to deny petitioner any rights guaranteed by the constitution.

Shelley involved the state courts' judicial enforcement of covenants restricting the use or occupancy of real property based on race or color. The covenants were entered into by private persons and, standing alone, while voluntarily adhered to, were not violative of the Fourteenth Amendment because there was no state action. This Court held, however, that judicial enforcement of the racially restrictive covenants was state action violative of the equal protection clause, reasoning that petitioners would have been able to occupy the properties without restraint had the state courts not judicially enforced the restrictive covenants.

Similarly, *Barrows* involved judicial enforcement of racially restrictive covenants by the award of money damages against an individual violating the covenant. As in *Shelley,* this Court found state action in the judicial enforcement of the covenant — coercion by the state courts of an individual to continue to use the property in a racially discriminatory manner. By awarding damages against one who chose not to adhere to the racially restrictive covenant, the state put its sanction behind the discriminatory covenants and encouraged their use.

Finally, in *New York Times*, this Court held that the Alabama courts' application of state law in a libel action brought by a public official against critics of his official conduct, making a publication "libelous per se" if the publication is false and tends to injure a person's reputation was constitutionally deficient because it failed to provide safeguards for freedom of speech and press and failed to require a showing of actual malice. In explaining why the Alabama rule was constitutionally deficient, this Court reasoned at 376 U.S. 279-80:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. [Footnote omitted.] Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.
>
> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

This case is distinguishable from *Shelley*, *Barrows*, and *New York Times*, *supra*. Here, there was no judicial stamp of approval or judicial sanction by the state court of private conduct which in any way infringed upon constitutional rights, as there was in *Sherbert* and *Barrows*. Dr. Drury did not infringe on the Shorters' free exercise of religious beliefs. He did not administer a transfusion against their will, but respected their right to exercise their religious beliefs against transfusions to the fullest. Nor was there any imposition of a penalty by the state courts to coerce any private individual to deprive plaintiff of any constitutional rights as there was in *Barrows* and *New York Times*. Here, the state courts did nothing to infringe on the Shorters' free exercise of religion or coerce them, in any way, to forego the exercise of their religious beliefs. The state courts merely allowed the jury to determine the degree to which the Shorters, as opposed to Dr. Drury, bore responsibility for a death that undisputedly would not have occurred, notwithstanding any claimed negligence by Dr. Drury, had the Shorters not refused a blood transfusion.

As was noted in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978), and *Evans v. Abney*, 396 U.S. 435, 24 L. Ed. 2d 634, 90 S. Ct. 628 (1970), not every state court application of neutral principles of state law or state court denial of relief to private parties constitutes state action within the purview of the constitution. As this Court noted in *Evans*, *supra*, 396 U.S. at 444 and 446, in holding that the Georgia courts did not violate the Fourteenth Amendment by terminating a testamentary trust when it could no longer be operated exclusively for whites as the testator had instructed:

> . . . The construction of wills is essentially a state-law question . . . and in this case the Georgia Supreme Court, as we read its opinion, interpreted Senator Bacon's will as embodying a preference for termination of the park rather than its integration. Given this, the Georgia Court had no alternative under its relevant trust laws, which are longstanding and neutral with regard to race, but to end the Baconsfield trust and return the property to the senator's heirs.

> The only choice the Georgia courts either had or exercised in this regard was their judicial judgment in construing Bacon's will to determine his intent and the Constitution imposes no requirement upon the Georgia courts to approach Bacon's will any differently than they would approach any will creating any charitable trust of any kind. Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and nondiscriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust.

Here, the Washington courts merely applied state assumption of risk law to determine private parties' responsibility for the death of Mrs. Shorter. The common law principles applied by the Washington courts were neutral and would apply equally in any wrongful death medical malpractice action where plaintiffs voluntarily refuse a blood transfusion that would have averted death, regardless whether the motivation for refusing the transfusion was religious. The First Amendment does not require the Washington courts to apply assumption of risk law differently to determine the respective rights and liabilities of the parties to this litigation simply because the Shorters assumed the risk of death from bleeding by refusing a transfusion on religious grounds. The Shorters' First Amendment rights do not require that another private party must bear the costs of the exercise of their religious beliefs or that the Washington courts must force another private party to bear those costs.

B. The Federal Question Raised by Petitioner is Not Dependent Upon the Washington Supreme Court's Finding of Fact That the Shorters Understood and Expressly Assumed the Risk of Bleeding to Death.

Petitioner, relying upon *Fiske v. Kansas*, 274 U.S. 380, 71 L. Ed. 1108, 47 S. Ct. 655 (1927); *Creswill v. Grand Lodge, Knights of Pythias of Georgia*, 225 U.S. 246, 56 L. Ed. 1074, 32 S. Ct. 822 (1912); and *Sterling v. Constantin*, 287 U.S. 378, 77 L. Ed. 375, 53 S. Ct. 190 (1932), asks this court to analyze the facts to determine whether the Washington Supreme Court correctly found that the Shorters understood and expressly assumed the risk of bleeding to death. Each of those cases, however, is inapposite.

In both *Fiske* and *Creswill, supra*, this Court found that a federal right had been denied as a result of a finding shown by the record to be without *any* evidence to support it. Here, there was ample evidence to support a finding that the Shorters understood and expressly and voluntarily assumed the risk of bleeding to death. *See* factual narration at page 7, *supra*. Furthermore, as previously discussed at pages 11-17, *supra*, there was no denial of any federal right by the finding that the Shorters had voluntarily and expressly assumed the risk of death from bleeding.

Sterling, supra, is also distinguishable from this case. *Sterling* involved the federal district court's issuance of an injunction restraining the governor from enforcing his military order restricting complainants' production of oil. The district court found no exigency warranting the imposition of martial law and found the governor's order violative of complainants' Fourteenth Amendment rights. Appellants argued that the federal courts were powerless to intervene or to review the governor's order. In *Sterling*, therefore, the questions of fact and law were so intermingled as to make it necessary for the courts to review the facts in order to decide the federal question.

The same was true in *New York Times, supra.* There, the question of whether the statements made in the allegedly libelous publication were protected by the First Amendment necessarily required the Court to analyze the facts to determine whether the statements were made with actual malice or were simply honest misstatements of fact. The questions of fact and law again were so intertwined as to make it necessary to review the facts to decide the federal question.

That is not the case here. It is not necessary for this Court to determine the sufficiency of evidence as to whether the Shorters knew and understood the risk of death from bleeding or voluntarily chose to encounter the risk in order for this Court to determine whether the First Amendment prohibits a state court from entertaining the assumption of risk defense where the alleged assumption of risk was for religious reasons.

C. No Federal Question is Involved in the Washington Supreme Court's Decision Not to Consider Additional Evidence.

Petitioner asserts that the Washington Supreme Court erred in failing to grant his motion to take additional evidence — the affidavit of Randall D. Austin — after the Washington Supreme Court had rendered its opinion. Whether or not the Washington Supreme Court should take additional evidence before or after rendering its decision is purely a matter of state law.

Washington Rule of Appellate Procedure (RAP) 9.11 provides the limited remedy for the taking of additional evidence on appeal in Washington. That rule provides:

> (a) *Remedy Limited.* The appellate court may only on its own initiative direct that additional evidence be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to

> excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post-judgment motions in the trial court is inadequate or unnecessarily expensive (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.
>
> (b) *Where Taken.* The appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.

Petitioner's motion to take additional evidence before the Washington Supreme Court did not come within the limited scope of RAP 9.11. The limited relief under RAP 9.11 is available only upon the appellate court's initiative and only before a written decision is filed. Here, the Washington Supreme Court did not, *sua sponte*, decide that additional evidence was necessary to resolve the issues on appeal and appellant's motion to take additional evidence was made more than two weeks after the court's written opinion was filed.

Furthermore, under RAP 9.11, all six criteria for taking additional evidence must be met. All six criteria were not met here. Additional proof was not needed to fairly resolve the issues on appeal. The additional evidence would not have changed the result. It was not equitable to excuse the petitioner's failure to discover and present the evidence at trial. The adequacy of remedy through post-judgment motions had never been explored. And, it would not be inequitable to decide the case solely on the evidence that was presented at trial.

D. Questions as to the Inviolateness of a Medical Liability Release and the Trial Court's Failure to Consider Only Mrs. Shorter's Conduct on the Question of Assumption of Risk Should Not Be Considered by This Court as Those Questions Were Not Raised in the State Court Proceedings.

Petitioner for the first time in his Petition for Writ of Certiorari, argues that "a medical liability release form signed by a competent adult should be held to be inviolate, even in the marriage arrangement," and asserts that "the trial court erred in failing to limit the jury to consider only assumption of risk on the part of Doreen Shorter when awarding damages." See pages 28-30 of the Petition for Writ of Certiorari. At no time in the proceedings before the trial court or the Washington Supreme Court did petitioner raise either issue. Where questions were not raised in the state court proceedings, such questions are not open in a proceeding on petition for certiorari. *See e.g., Ellis v. Dixon*, 349 U.S. 458, 99 L. Ed. 1231, 75 S. Ct. 850, *rehearing denied*, 350 U.S. 855, 100 L. Ed. 759, 76 S. Ct. 37 (1955).

IV. CONCLUSION

Based on the foregoing, respondents respectfully request the Court to deny petitioner's Petition for Writ of Certiorari to the Washington Supreme Court.

Respectfully submitted this 26th day of July, 1985.

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